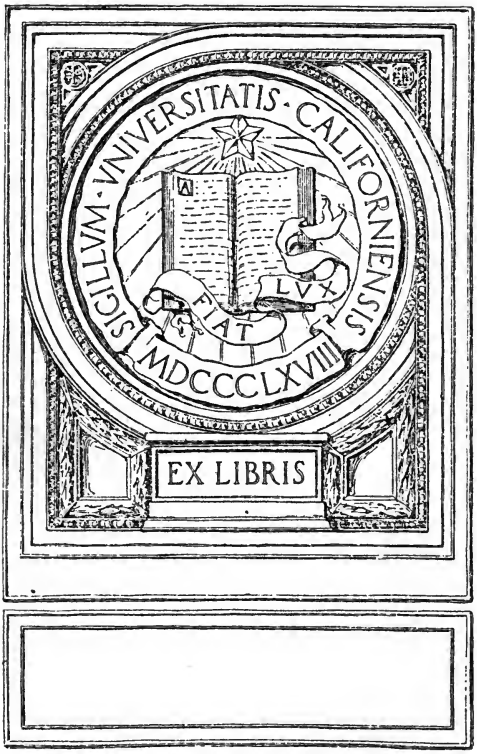
SIGILLVM · VNIVERSITATIS · CALIFORNIENSIS
LVX
FIAT
MDCCCLXVIII
EX LIBRIS

A NEW PROVINCE FOR LAW AND ORDER

First published, 1922

A NEW PROVINCE FOR LAW & ORDER

BEING A REVIEW, BY ITS LATE PRESIDENT FOR FOURTEEN YEARS, OF THE AUSTRALIAN COURT OF CONCILIATION AND ARBITRATION

By

HENRY BOURNES HIGGINS, M.A., LL.B.

JUSTICE OF THE HIGH COURT OF AUSTRALIA, AND
PRESIDENT OF THE COURT OF CONCILIATION AND ARBITRATION, 1907–1921

CONSTABLE & COMPANY LTD.

LONDON BOMBAY SYDNEY

PREFACE

It has been suggested to me by friends who take an active interest in the solution of the world's industrial problems—friends in several countries—that I should state in book form the results of my experience of nearly fourteen years, now that I have resigned the presidency of the Commonwealth Court of Conciliation and Arbitration. To comply with the suggestion, I think that I cannot do better than collect three articles which I wrote for the *Harvard Law Review* of November, 1915, January, 1919, December, 1920, and then add some supplemental matter and general conclusions. The editors of the *Review* have been good enough to assent to this course. I hope that my friends will not regard it as a device to spare myself effort. There is this advantage, that as the articles appeared at considerable intervals they are really a better indication of the gradual development of standards and practice in the solution of actual problems than any synthetic statement of the present position would be. I had to learn the business, with no book of instructions, no teacher other than experience, no kindly light except from the pole star of justice. It is my hope that this little book will afford some encouragement to men of public spirit who are endeavouring to

bring some order out of the present industrial chaos, for they will see how standards have been created for industrial relations, how the human instruments of industry have had their lives brightened, and how extremely few have been the stoppages of work in disputes within the competence of the Court. The book may also throw some light on certain dangerous rocks which discreet Governments and Parliaments would avoid.

I desire to express my thanks to Mr. G. V. Portus, Director of Tutorial Classes in Sydney and General Editor of the W.E.A. Series, for his encouragement and valuable assistance in preparing this little book for the press.

H. B. HIGGINS.

MELBOURNE,
March, 1922.

CONTENTS

A NEW PROVINCE FOR LAW AND ORDER

CHAPTER I.

AN ARTICLE CONTRIBUTED TO THE *Harvard Law Review*, PUBLISHED IN NOVEMBER, 1915.

THE new province is that of the relations between employers and employees. Is it possible for a civilized community so to regulate these relations as to make the bounds of the industrial chaos narrower, to add new territory to the domain of order and law? The war between the profit-maker and the wage-earner is always with us; and, although not so dramatic or catastrophic as the present war in Europe, it probably produces in the long run as much loss and suffering, not only to the actual combatants, but also to the public. Is there no remedy?

During a brief sojourn in the United States in the summer of 1914, I had the good fortune to meet many men and women of broad and generous outlook and of admirable public spirit. They were anxious to learn what I, as President of the Australian Court of Conciliation and Arbitration, could tell them of Australian methods of dealing with labour questions. I propose now, on the invitation of the editor of this *Review*, to state briefly the present position, confining my survey to my own personal experience.

The Australian Federal Constitution of 1900 gave to the Federal Parliament power to make laws with respect to "conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State."[1] Following the example of the United States Constitution, the Constitution left all residuary powers of legislation to the States; and the theory generally held at the time of our constitutional convention was that each State should be left to deal with its own labour conditions as it thought best. But an exception was made, after several discussions, in favour of labour disputes which pass beyond State boundaries and cannot be effectually dealt with by the laws of any one or more States. Just as bushfires run through the artificial State lines, just as the rabbits ignore them in pursuit of food, so do, frequently, industrial disputes.

In pursuance of this power, an Act was passed December 15, 1904, constituting a Court for conciliation, and where conciliation is found impracticable, arbitration. The arbitration is compulsory in the sense that an award, if made, binds the parties. The Act makes a strike or a lock-out an offence if the dispute is within the ambit of the Act—if the dispute is one that extends beyond the limits of one State. In other words, the process of conciliation, with arbitration in the background, is substituted for the rude and barbarous processes of strike and lock-out. Reason is to displace force; the might of the State is to enforce peace between industrial combatants as well as between other combatants; and all in the interest of the public.

[1] Sec. 51 (XXXV.).

Under the Act, the Court consists of a President, who must be one of the justices of the High Court of Australia. The High Court is modelled on the Supreme Court of the United States, having often to decide whether Acts are constitutional, but it is also a Court of Appeal from the Supreme Courts of the States. The first President of the Court of Conciliation was appointed February 10, 1905, and, on his resignation in September, 1907, I was appointed as his successor.

The first task that I had to face was not, strictly speaking, conciliation or arbitration. The Federal Parliament imposed certain excise duties on agricultural implements manufactured, but it provided for the remission of the duties in the case of goods manufactured under conditions, as to the remuneration of labour, which the President of the Court should certify to be "fair and reasonable."[1] The Act gave no guidance as to the model or criterion by which fairness and reasonableness were to be determined. In dealing with the first employer who applied to me for a certificate, I came to the conclusion that the Act was designed for the benefit of employees, and that it was meant to secure for them something which they could not get by individual bargaining with their employers. If A let B have the use of his horse on the terms that B give the horse fair and reasonable treatment, B would have to give the horse proper food and water, shelter and rest. I decided therefore to adopt a standard based on "the normal needs of the average employee, regarded as a human being living in a civilized community." This was to be the primary test in

[1] Excise Tariff 1906.

ascertaining the minimum wage that would be treated as "fair and reasonable" in the case of unskilled labourers. At my suggestion, many household budgets were stated in evidence, principally by housekeeping women of the labouring class; and, after selecting such of the budgets as were suitable for working out an average, I found that in Melbourne, the city concerned, the average necessary expenditure in 1907 on rent, food, and fuel, in a labourer's household of about five persons, was £1 12s. 5d. (about $7.80, taking a dollar as equivalent to 4s. 2d.); but that, as these figures did not cover light, clothes, boots, furniture, utensils, rates, life insurance, savings, accident or benefit societies, loss of employment, union pay, books and newspapers, tram or train fares, sewing machine, mangle, school requisites, amusements and holidays, liquors, tobacco, sickness or death, religion or charity, I could not certify that any wages less than 42s. per week for an unskilled labourer would be fair and reasonable. Then, in finding the wages which should be treated as fair and reasonable in the cases of the skilled employees, I relied mainly on the existing ratios found in the practice of employers. If, for instance, the sheet-iron worker got 8s. per day when the labourer got 6s., the sheet-iron worker should get, at the least, 9s. when the labourer's minimum was raised to 7s.

In the case referred to, the employer did not raise before me the point that the Act was invalid; but, having failed in his application for a certificate, he refused to pay the excise duty, and defended an action to recover the duty before the High Court on the ground that the Act was invalid; and he succeeded, by a majority of three justices to two, on

the ground that the Act was not really a taxation Act at all, but an Act to regulate labour conditions, and as such beyond the competence of the Federal Parliament.[1] But the principles adopted in the case for ascertaining a "fair and reasonable" minimum wage have survived and are substantially accepted, I believe universally, in the industrial life of Australia.

In the first true arbitration case—that relating to ship's cooks, bakers, etc.—the standard of 7s. per day was attacked by employers, but I do not think that it has been attacked since, probably because the cost of living has been rising. The Court announced that it would ascertain first the necessary living wage for the unskilled labourer, and then the secondary wage due to skill or other exceptional qualifications necessary. Treating marriage as the usual fate of adult men, a wage which does not allow of the matrimonial condition and the maintenance of about five persons in a home would not be treated as a living wage. As for the secondary wage, it seemed to be the safest course, for an arbitrator not initiated into the mysteries of the several crafts, to follow the distinctions in grade between employers as expressed in wages for many years.

The distinction between the basic or primary or living wage and the secondary wage attributable to exceptional qualifications necessary for the performance of the function is not fanciful; it was forced on the Court by the problems presented and by the facts of industrial life. Yet it has to be borne in mind that though the essential natural needs come first, the conventional needs (*e.g.*, of artisans as dis-

[1] King *v.* Barger, Commonwealth *v.* McKay, 6 C.L.R. 41 (1908).

tinguished from labourers) become, by usage, almost equally imperative.[1]

The following propositions may, I think, be taken to be established in the settlement of minimum wages by the Court; and it is surprising to find how often, as the principles of the Court's action come to be understood and appreciated, they guide parties disputing to friendly collective agreements, without any award made by the Court.

1. One cannot conceive of industrial peace unless the employee has secured to him wages sufficient for the essentials of human existence.[2]

2. This, the basic wage, must secure to the employee enough wherewith to renew his strength and to maintain his home from day to day.[3]

3. The basic wage is the same for the employee with no family as for the employee with a large family. It rests on Walt Whitman's "divine average," and the employer need not concern himself with his employee's domestic affairs.

4. The secondary wage is remuneration for any exceptional gifts or qualifications,[4] not of the individual employee, but gifts or qualifications necessary for the performance of the functions, *e.g.*, skill as a tradesman, exceptional heart and physique, as in the case of a gas stoker,[5] exceptional muscular training and power, as in the case of a shearer,[6] exceptional

[1] Engine-drivers, 7 C.A.R. 132, 139 (1913).
[2] Boot-factories, 4 C.A.R. 1, 10 (1910); Seamen, 5 C.A.R. 147, 164 (1911).
[3] Broken Hill Mine, 3 C.A.R. 1, 20 (1909).
[4] Boot-factories, 4 C.A.R. 1, 10 (1910); Postal Electricians, 7 C.A.R. 5, 10 (1913); Builders' Labourers, 7 C.A.R. 210, 217 (1913).
[5] Gas Employees, 7 C.A.R. 58, 71 (1913).
[6] Shearers, 5 C.A.R. 48, 79 (1911).

responsibility, *e.g.*, for human life, as in the case of winding or locomotive engine-drivers.[1]

5. The secondary wage, as far as possible, preserves the old margin between the unskilled labourer and the employee of the skilled or exceptional class.[2]

6. After ascertaining the proper wages, basic and secondary, the Court considers any evidence adduced to show that the employers ought not to be asked to pay such wages.[3] It will consider grounds of finance, of competition with imports, of unfairness to other workers, of undue increase of prices of the product, of injury to the public, etc.

7. The wages cannot be allowed to depend on the profits made by the individual employer, but the profits of which the *industry* is capable may be taken into account. If the industry is novel, and those who undertake it have to proceed economically, there may be a good case for keeping down wages, but not below the basic wage, which must be sacrosanct. Above the basic wage, bargaining of the skilled employee may, with caution, be allowed to operate.[4]

8. The fact that a mine is becoming exhausted or poorer in its ores is not a ground for prescribing a lower rate than would otherwise be proper. If shareholders are willing to stake their own money on a speculation, they should not stake part of the employee's proper wages also. The Court cannot

[1] Engine-drivers, 5 C.A.R. 9, 21 (1911).
[2] McKay, 2 C.A.R. 1, 16 (1907); Ship's Cooks, 2 C.A.R. 55, 65, 66 (1908).
[3] Broken Hill Mine, 3 C.A.R. 1, 31 (1909).
[4] *Ibid.*, 32; Shearers, 5 C.A.R. 48, 73 (1911); Ship's Officers, 6 C.A.R. 6, 21 (1912).

endanger industrial peace in order to keep unprofitable mines going.[1]

9. The Court does not increase the minimum on the ground of affluence of the employer. It is not affected by the fact that one of the employers can, by skilful management, by enterprise, or by good fortune, make very large profits.[2]

10. The minimum rate must be based on the highest function that the employee may be called on to exercise. The employer must not give a plumber labourer's work and pay him labourer's wages if he has also to do plumbing.[3]

11. In finding the proper minimum rate, the Court tries to find what would be proper for an employee of average capacity called upon to do work of the class required. If the employer desires to secure the services of an exceptional workman, he is free to do so. The payment of higher rates is left to the play of bargaining.[4]

12. The Court does not attempt to discriminate in wages on the ground of comparative laboriousness. Discrimination on such a ground is neither safe nor sound. The Court declined to give an extra rate to hodmen if they carry beyond a certain height.[5]

13. The Court will not discriminate in wages as between the several States so as to interfere with the

[1] Broken Hill Mine, *supra*, 33-34; Engine-drivers, 7 C.A.R. 132, 139 (1913).

[2] Seamen, 5 C.A.R. 147, 164 (1911); Gas Employees, 7 C.A.R. 58, 72 (1913).

[3] Postal Electricians, 7 C.A.R. 5, 8-9 (1913).

[4] Ship's Stewards, 4 C.A.R. 61, 63, 68 (1910); Engine-drivers, 5 C.A.R. 9, 15 (1911); Shearers, 5 C.A.R. 48, 91 (1911); Builders' Labourers, 7 C.A.R. 210, 223 (1913).

[5] *Ibid.*, 231.

freedom of trade between the States provided by the Constitution.[1]

14. The Court will not keep down wages on steamers so as to enable them to beat State railways in competition or to help one competitor against another.[2]

15. The Court accepts and follows the usual practice of making rates for casual employment higher than the corresponding rates for continuous employment.[3]

16. The Court, in obedience to the Act, provides exceptions to the minimum rate in the case of aged, slow, or infirm workers, but the exceptional cases must be disclosed to the representative of the union, and be well safeguarded.[4]

17. But the Court will not provide exceptions to the minimum rate for "improvers," men paid more than boys and less than journeymen, men who are used to beat down the claims of competent journeymen, and are thus a perpetual menace to the peace of the community.[5]

18. The Court regards the old system of apprenticeship as unsuitable for factories under modern conditions, and it objects to fixing a rigid proportion of apprentices to journeymen without regard to the circumstances—*e.g.*, the character of the output of each factory. But if conditions of apprenticeship are in dispute, the Court will, especially if both sides wish it, and for the sake of peace as well as efficiency, make regulations on the subject. The proper method,

[1] Constitution, Sec. 92 ; Boot-factories, 4 C.A.R. 1, 13 (1910).
[2] Ship's Officers, 6 C.A.R. 6, 22 (1912).
[3] Builders' Labourers, 7 C.A.R. 210, 218 (1913).
[4] Act, Sec. 40 ; Boot-factories, 4 C.A.R. 1, 24 (1910).
[5] Boot-factories, 4 C.A.R., 1, 16 (1910).

however, seems to be, in boot-factories, to co-ordinate the work of the factories with the work of the technical schools.[1]

19. The Court will not prescribe extra wages to compensate for unnecessary risks to the life or health of the employee or unnecessary dirt. No employer is entitled to purchase by wages the right to endanger life or to treat men as pigs.[2]

20. The Court gives weight to existing conventions, usages, prejudices, exceptional obligations and expenses of the employees; for instance, that masters and officers are required to keep up a certain appearance, and that stewards must provide themselves with uniform and laundry.[3]

21. Where it is established that there is a marked difference in the cost of living between one locality and another, the difference will, so far as possible, be reflected in the minimum wage.[4]

22. But where, as in the case of the wharf labourers at ports, all the employees and nearly all the employers desired that there should be no differentiation, the Court bases the minimum wage on the mean Australian cost of living.[5]

23. In cases such as that of ship's stewards, where the employees usually receive from passengers "tips" (or "bunce"), the average amount of the tips must

[1] Boot-factories, 4 C.A.R. 19, 20 (1910).
[2] Ship's Cooks, 2 C.A.R. 55, 59, 60 (1908); Seamen, 5 C.A.R. 147, 164 (1911).
[3] Ship's Officers, 4 C.A.R. 89, 93, 95 (1910); Ship's Stewards, 4 C.A.R. 61, 66 (1910).
[4] Broken Hill Mine, 3 C.A.R. 1, 28-30 (1909); Engine-drivers, 5 C.A.R. 9, 23 (1911); 7 C.A.R. 132, 141 (1913); Fruit-growers, 6 C.A.R. 61, 69 (1912); Gas Employees, 7 C.A.R. 58, 70-74 (1913); Builders' Labourers, 7 C.A.R. 210, 221 (1913).
[5] Wharf Labourers, 8 C.A.R. (1914).

be taken into account in finding whether the employee receives a living wage. But the minimum wage will be raised to its proper level if the practice of tipping can be stopped.[1]

24. In cases where employees are "kept," found in food and shelter by the employer, the value of the "keep" is allowed in reduction of the wages awarded. At a time when the keep of single men, such as labourers, cost in lodgings, usually 15s. per week, the Court reduced the wages by 10s. only. For the 15s. at the family home would go further than it would go for board and lodging outside the home; and the employer who feeds a large number of men can buy the necessary commodities in large quantities and on advantageous terms. The 10s. per week seemed to represent fairly the amount of expenditure of which the home was relieved by the absence of the man.[2]

25. The principle of the living wage has been applied to women, but with a difference, as women are not usually legally responsible for the maintenance of a family. A woman's minimum is based on the average cost of her own living to one who supports herself by her own exertions. A woman or girl with a comfortable home cannot be left to underbid in wages other women or girls who are less fortunate.[3]

26. But in an occupation in which men as well as women are employed, the minimum is based on a man's cost of living. If the occupation is that of a blacksmith, the minimum is a man's minimum; if the occupation is that of a milliner, the minimum is

[1] Ship's Stewards, 4 C.A.R. 61, 64 (1910).
[2] Ship's Cooks, 2 C.A.R. 55, 62 (1908); Ship's Stewards, 4 C.A.R. 61, 63 (1910).
[3] Fruit-growers, 6 C.A.R. 61, 71 (1912).

a woman's minimum; if the occupation is that of fruit-picking, as both men and women are employed, the minimum must be a man's minimum.[1]

27. As regards hours of work, when disputed, the Court usually adheres to the general Australian standard of 48 hours; generally $8\frac{3}{4}$ hours on five days, $4\frac{1}{4}$ hours on Saturday. But in exceptional cases the Court has reduced the hours; in one case because of the nerve-racking character of the occupation;[2] in another case, that of builders' labourers, because the men have to "follow their job," spending much of their own time in travelling.[3]

28. The Court has conceded the eight hours' day, at sea as well as in port, to deckhands on ships;[4] to officers on ships,[5] to marine engineers.[6] But there are sundry necessary exceptions, and the Master retains the absolute right to call on any man in emergencies involving the safety of the ship; and for other purposes he may call on any man, paying extra rates for the overtime. The hours of navigating officers were sometimes shocking, and involved danger to ship, cargo, and passengers.[7]

29. In certain exceptional cases the Court has granted a right to leave of absence for two or three weeks on full pay to employees after a certain length of continuous service; not, of course, to casual or temporary employees.[8]

[1] Fruit-growers, 6 C.A.R., 72.
[2] Postal Electricians, 7 C.A.R. 5, 15-16 (1913).
[3] Builders' Labourers, 7 C.A.R. 210, 228-9 (1913).
[4] Seamen, 5 C.A.R. 147, 159, 160 (1911).
[5] Ship's Officers, 4 C.A.R. 89, 99 (1910).
[6] Marine Engineers, 6 C.A.R. 95, 107 (1912).
[7] Ship's Officers, 6 C.A.R. 6, 16, 17 (1912).
[8] *Ibid.*, 15, 25; 7 C.A.R. 92, 104 (1913); Postal Electricians, 7 C.A.R. 5, 17 (1913).

30. The Court refuses to dictate to employers what work they should carry on, or how; or what functionaries they should employ, or what functions for each employee; or what tests should be applied to candidates for employment.[1]

31. The Court leaves every employer free to carry on the business on his own system, so long as he does not perpetuate industrial trouble or endanger industrial peace; free to choose his employees on their merits and according to his exigencies; free to make use of new machines, of improved methods, of financial advantages, of advantages of locality, of superior knowledge; free to put the utmost pressure on anything and everything except human life.[2]

32. As regards complaints of disagreeable or onerous conditions, the Court treats as fundamental the consideration that the work of the ship, factory, mine, etc., must be done, a consideration next in order to that of the essential needs of human life. An order will not be made that is inconsistent with the effective management of the undertaking.[3]

33. On the same principle the Court steadily refuses to make orders which would militate against the public interest or convenience. It has refused to order prohibitive overtime rates for leaving port on Sundays;[4] it has refused to forbid the employment of casuals or to forbid "broken time" in tramway services. Casuals or "broken time," or both, are

[1] Broken Hill Mine, 3 C.A.R. 1, 36 (1909); Postal Electricians, 7 C.A.R. 5, 7, 8, 13, 18, 19 (1913).

[2] Boot-factories, 4 C.A.R. 1, 18 (1910); Shearers, 5 C.A.R. 48, 100 (1911); Fruit-growers, 6 C.A.R. 61, 75 (1912); Gas Employees, 7 C.A.R. 58, 77 (1913).

[3] Ship's Stewards, 4 C.A.R. 61, 73 (1910); Ship's Officers, 4 C.A.R. 89, 101 (1910).

[4] Seamen, 5 C.A.R. 147, 160 (1911).

necessary to meet the extra traffic at certain times of the day.[1]

These are some of the principles of action adopted by the Court. But, it may be asked, what about piecework? How does the Court fix piecework rates? The first great case in which piecework rates were directly involved was that of the shearers.[2] At the time of the arbitration, wool furnished nearly 40 per cent. of the exports of Australia, nearly £29,000,000 per annum, in addition to the wool used in Australia. In that case the Court prescribed the piecework rates on a time-work basis—found the piecework rates which would enable an average shearer to earn such wages per week as would be the just minimum for a man with the qualifications of a shearer if he were paid by time. Having found that the shearer should, as a "skilled" worker, get a net wage of £3 per week for the time of his expedition to the sheep stations to shear, and having found that a rate of 24s. per 100 sheep would give this net result, the Court fixed 24s. per 100 as the minimum rate.[3] In finding the net returns of the whole expedition, allowances had to be made for days of travelling and waiting, expenses en route, cost of mess and combs and cutters.[4] This system of finding the net result of the *expedition*, and what would be a fair return for the expedition, was also adopted in the case of persons employed by fruit-growers on the River Murray.[5] Sometimes the Court protects piece-workers in making their bargain by prescribing that their remuneration shall not fall below, in result, a certain timework minimum.[6]

[1] Tramways, 6 C.A.R. 130, 144 (1912).
[2] 5 C.A.R. 48 (1911).
[3] *Ibid.*, 73, 79.
[4] 5 C.A.R. 74, 76.
[5] Fruit-growers, 6 C.A.R. 61, 68 (1912).
[6] *Ibid.*, 75.

The system of arbitration adopted by the Act is based on unionism. Indeed, without unions, it is hard to conceive how arbitration could be worked. It is true that there are methods provided by which the Court can intervene for the preservation of industrial peace even when its powers are not invoked by any union; but no party can file a plaint for the settlement of a dispute except an "organization," that is to say, a union of employers or of employees registered under the Act.[1] One of the "chief objects" of the Act, as stated in Sec. 2, is "to facilitate and encourage the organization of representative bodies of employers and of employees and the submission of industrial disputes to the Court by organizations"; and it follows that the Court will not assist an employer in devices to stamp out unionism.[2] It is, of course, better for an employer that he should not be worried by complaints of individual employees and that any complaints should be presented collectively by some responsible union. He has then the advantage of being able to deal with his employees on a consistent scheme, equitable all round the service, and his time is not taken up by petty complaints or individual fads. A demand made on him comes from a responsible executive, with the consent, direct or indirect, of the organized body of members of the union. Moreover, from the point of view of the employees, it is better that an individual employee should not, by complaining, incur the risk of becoming a marked man or of being removed, and the individual employee is generally powerless. From the point of view of the Court and of the public, it is fair to state that in nearly every case—I can only

[1] Sec. 19. [2] Tramways, 6 C.A.R. 130, 143 (1912).

remember one case to the contrary—the influence of union leaders has always been in the direction of peace. It would not be so, probably, if there were no means of obtaining an improvement of conditions except by strike, actual or threatened, but in Australia the leaders can hold out to the members of the union a prospect of relief without strike, from the Court or from some wages board.[1] It is significant that in the one exceptional case referred to, the leaders of the union have been converted, so that they are now strong advocates of arbitration.

But then comes the difficult question of "preference to unionists." Preference to unionists is the Australian analogue of the "preferential union shop" made familiar in some of the garment industries of the United States. The Act gives the Court power to direct that as between members of organizations (unions) of employees and other persons desiring employment at the same time preference shall be given to such members, other things being equal.[2] But it is only a power, not a duty, to order such preference; and the Court is very loth to exercise the power. "The absolute power of choice (between applicants for employment) is one of the recommendations of the minimum wage system, from the employer's point of view—he can select the best men available when he has to pay a certain rate."[3] For this reason preference was refused in the case of shearers, etc.;[4] in the case of seamen ;[5] in the case of builders' labourers.[6] Yet the Court recognizes the

[1] Marine Engineers, 6 C.A.R. 95, 100 (1912). [2] Sec. 40.
[3] Engine-drivers, 5 C.A.R. 9, 25 (1911); 7 C.A.R. 132, 147 (1913); Tramways, 6 C.A.R. 35, 47 (1912).
[4] 5 C.A.R. 48, 99 (1911). [5] 5 C.A.R. 147, 170 (1911).
[6] 7 C.A.R. 210, 233 (1913).

difficulty of the position. As was said in the builders' labourers case:

"The truth is, preference is sought for unionists in order to prevent preference of non-unionists or anti-unionists—to prevent the gradual bleeding of unionism by the feeding of non-unionism. It is a weapon of defence. For instance, some employers here hired men through the Independent Workers' Federation—a body supported chiefly by employers' money, and devised to frustrate the ordinary unions; and those who applied for work at the office of this body would not be introduced to the employer unless they ceased to be members of the ordinary unions and became members of this body. What is to be done to protect men in the exercise of their right as free men to combine for their mutual benefit, seeing that the employing class has the tremendous power of giving or withholding work? The only remedy that the Act provides is an order for preference; and it is doubtful whether such an order is appropriate or effective. It is, indeed, very trying for men who pay full dues to a legitimate union to work side by side with men who do not—with men who look to their own interests only, seeking to curry favour with the employers, getting the benefit of any general rise in wages or betterment of conditions which is secured without their aid and in the teeth of their opposition, men who are preferred (other things being equal) for vacancies and promotion. Every fair man recognizes the difficulty of the position—every man who is not too much of a partisan to look sometimes at the other side of the edge. In another case recently before me, a non-unionist told me that he acted solely on the basis of his personal interest, without any regard for

the interests of his fellow-workers. He looked for favours to himself, because he kept away from those who combined for the common good of the whole body. It is not out of consideration for such men that I refuse preference; it is rather out of consideration for such employers as honestly take the best man available, unionist or not. I do not want them to be harassed with the doubt, when selecting men for a post, whether they can prove their appointee to be better than all the unionist applicants. I refuse preference also out of consideration for many who have not joined any union simply because they have not felt the need. In the case of country building work, for instance, it is common for men on farms, etc., when farm work is not pressing, to take a job as builders' labourer. Why should the employer be compelled to bring union labourers from the city? After all, the direct way for unionists to counteract unfair preference of non-unionists is for the unionists to excel—to give to the employer the best service. It is nearly always found that employers prefer a first-class man who is unionist to a second-class man who is non-unionist."[1]

The only case in which the Court has ordered preference is the case of a tramway company which deliberately discriminated against unionists and refused to undertake not to discriminate in future.[2] It is to be observed that the Court is not given power by the Act to order that the employer shall not discriminate against unionists in giving or withholding employment.

The imposition of a minimum wage, a wage below

[1] 7 C.A.R. 210, 233-4 (1913).
[2] Tramways, 6 C.A.R. 130, 162 (1912).

which an employer must not go in employing a worker of a given character implies, of course, an admission of the truth of the doctrine of modern economists, of all schools I think, that freedom of contract is a misnomer as applied to the contract between an employer and an ordinary individual employee. The strategic position of the employer in a contest as to wages is much stronger than that of the individual employee. "The power of the employer to withhold bread is a much more effective weapon than the power of the employee to refuse to labour."[1] Low wages are bad in the worker's eyes, but unemployment, with starvation in the background, is worse. The position was put luminously once, as well as with unconscious humour, by an employer on whom a plaint was served for settlement of a dispute by the Court. In place of filing an answer he wrote a letter to the registrar, denying that he was a party to any dispute. "I have never," said he, "quarrelled or disputed with a labourer of any kind. . . . *If we cannot agree, well, we will part; that ends the whole* . . . Love is the power which will end all struggles, not legislation." Other respondents pin their faith, not to "love," but to the sterner "law of supply and demand." They treat this law as being, in the matter of wages, more inexorable and inevitable than even the law of gravitation, as not being subject, as laws of nature are, to counteraction, to control, to direction. "One may dam up a river, or even change its course; but one cannot (it is said) raise wages above the level of its unregulated price, above the level of a sum which a man will accept rather than be

[1] Engine-drivers, 5 C.A.R. 9, 27 (1911).

starved."[1] If the Court did nothing else than drag such theories into the light of day, and into free discussion, it would be doing good service to the community. But it is coming to be recognized that what the Court does in fixing a minimum wage is by no means novel in principle. There are many Acts of many Legislatures which prescribe minimum conditions on other subjects. For example, Mining Acts often prescribe minimum conditions as to ventilation, timbering, safety appliances, machinery, sanitation. These matters are not left to individual bargaining.

There are no definite figures with regard to the cost to the parties of arbitration proceedings, but the cost is very slight. There are seldom any costs incurred in employing lawyers, for, under Sec. 27 of the Act, lawyers cannot be employed except with the consent of both parties, and the employees generally refuse their consent. The secretary of the organization generally puts its case, and the employers or some permanent officer generally put the employers' case. The principal expense of an arbitration is that of bringing witnesses. If prohibition proceedings are taken in the High Court to prevent the enforcement of an award on the ground that the Court of Conciliation has exceeded its jurisdiction (of which I shall say more presently), no doubt heavy, very heavy, expenses are incurred, but these are not expenses of the arbitration.

But it has to be admitted that proceedings in the Court of Conciliation often take a very long time, sometimes weeks, in a few cases months. The proceedings cannot be otherwise than lengthy, as the

[1] Engine-drivers, 5 C.A.R. 27, 28 (1911); Ship's Officers, 6 C.A.R. 6, 18 (1912); Marine Engineers, 6 C.A.R. 95, 101 (1912).

disputes of which the Court can take cognizance are so widespread—must extend from one State into one or more other States. Moreover, the habit is to bring before the employers, and afterwards before the Court, a very long list of conditions in dispute, and the case of each employer has to be fairly considered by the Court in connection with each grievance. The number of employers respondents to a plaint is generally great. There were 311 employers in the Engine-drivers' case;[1] 570 in the case of the Builders' labourers,[2] 650 in that of the Fruit-growers;[3] and 2,549 at least in that of the Shearers.[4] The Court has no power to make an award a common rule of the industry; it cannot investigate and settle the proper conditions to be applied in one typical undertaking and then extend the same conditions to other undertakings of the same character. The act purported to give this power to the Court, but it was held by the High Court, on a case stated, that the Act was in this respect unconstitutional and invalid.[5] This want of power to make a common rule for the industry not only lengthens the proceedings, but it also may operate to the prejudice of the employers who are bound by the award. For the Court can deal only with employers who employ members of the union. Some rival employers may have no members of the union in their employment and therefore have to be excluded from the award. Their hands are free as to wages, while the hands of the others are fettered, and this is, of course, unfair as between competitors

[1] 7 C.A.R. 132 (1913).
[2] 7 C.A.R. 210 (1913).
[3] 6 C.A.R. 61, 65 (1912).
[4] 5 C.A.R. 48, 65 (1911).
[5] Boot-factories, 11 C.L.R. 311 (1910).

in the trade. In one case, that of the boot factories,[1] the difficulty was met by the employers and employees concurring in an application before the wages boards of each of the States concerned to have the terms of the award made a common rule for the State. But this remedy is not always available.

There is a provision in the Act[2] enabling the Court to appoint a board of reference, assigning to it the function of determining specified matters which under the award may require to be determined. Such a provision, if properly drafted and valid, would be of eminent service to peace. Difficulties often arise under an award, owing to the vast variety of methods in the different undertakings, as to the application of the words of the award to some particular case. These and other difficulties ought to be met by collective adjustment, between representatives of the employers on the one side, and the representatives of the union on the other, with a neutral chairman; but from the nature of the case there would have to be a separate board in each of the centres of the industry. Nothing would tend more to prevent serious friction and to promote a mutual understanding of employers and employees. "A suitable Board of Reference under the ægis of a strong union, is a safety-valve for any industry."[3] But, unfortunately, as the section stands, with the interpretation put upon it by the High Court, it is practically useless. The parties on both sides of a dispute often seek a board, or rather boards, of reference,[4] but the Court cannot generally help them. Sometimes, however,

[1] 4 C.A.R. 1 (1910); Builders' Labourers, 7 C.A.R. 210, 235 (1913).
[2] Sec. 40 *a*. [3] Engine-drivers, 7 C.A.R. 132, 144 (1913).
[4] Seamen, 6 C.A.R. 59 (1912).

the parties to the dispute make and file agreements between the union and the several employers for a board and leave the Court to award on the other subjects in dispute; and the agreements are certified by the Court, and on being filed under Sec. 24 have the same binding effect as an award.[1]

There are two important powers of which the Court has frequently availed itself, or threatened to avail itself, with very excellent effect.[2] These are: (*a*) the power to withhold an award if it appear "that further proceedings by the Court are not desirable in the public interest;"[3] and (*b*) the power to vary an award.[4] Sometimes the employees, though seeking an award, have taken up an obstinate attitude, intimating in effect that if the award does not meet their wishes they will not abide by it; and the Court has plainly intimated that it will not proceed with the arbitration on such terms.[5] It cannot be for the public interest to proceed with the arbitration under such a constraint. Arbitration by the Court is meant to be a substitute for the method of strike, and "you cannot have award and strike too."[6] In one case, while the Court was preparing an award for seamen and firemen, information came that the firemen of the s.s. *Koombana* refused to work on the ship unless a certain chief steward were removed. The position was serious; the ship carried the mails, as well as passengers and cargo, for ports on the West Australian coast. There was an agreement in existence

[1] Engine-drivers, 7 C.A.R. 132, 135 (1913).
[2] Fruit-growers, 6 C.A.R. 61, 78 (1912).
[3] Sec. 38 *h*. [4] Sec. 38 *o*.
[5] Gas Employees, 7 C.A.R. 58, 62 (1913); Broken Hill Mine, 3 C.A.R. 1, 20 (1909).
[6] Liquor Trade, 7 C.A.R. 255 (1913).

under which it was a breach of agreement on the part of the union if by reason of any dispute a vessel were detained twenty-four hours. The Court intimated that it would not make its award so long as the agreement was not observed. As a result, officials of the union conducted suitable firemen to the port where the vessel lay, put them on board, and the *Koombana* went on her way; then, and not till then, the Court gave its award.[1]

The power to vary an award has also been held over the head of a recalcitrant union. It is not fair to keep the employers bound by the award if the union takes the benefit of the award and rejects the burden. The Court has power to lower or annul the minimum wage in such a case if necessary.[2] Fortunately it never has been necessary. I may give one case in point. The wharf labourers were on strike in Brisbane; seamen who were enjoying the benefit of an award were ordered to unload their vessel. They were naturally indisposed to comply, but, before refusing, they telegraphed to the Executive of their union for directions. They were told by the Executive to unload or they would lose the award. They unloaded.

Another very valuable power is that conferred by Parliament in 1910, under which the President may, when a dispute exists or is threatened, summon any person to attend a conference in his presence. The attendance is compulsory, enforcible by penalty.[3] Frequently a quiet talk at such a conference has prevented a strike which was imminent.[4] Fre-

[1] Seamen, 5 C.A.R. 147, 173-4 (1911).
[2] Fruit-growers, 6 C.A.R. 61, 78 (1912). [3] Sec. 16 *a*.
[4] Seamen, 4 C.A.R. 108 (1910); 5 C.A.R. 147, 154 (1911); Fruit-growers, 5 C.A.R. 37, 183 (1911); 6 C.A.R. 61, 62 (1912);

quently the parties arrange to proceed for arbitration and make temporary arrangements for carrying on work until the award.[1] Sometimes an actual strike confined to one State, though the dispute extended to two States, has been stopped, the men going back to work at the old rates until the award.[2] A further amendment was made in the Act in 1911, under which, if no agreement has been reached at the conference, the President can refer the dispute into the Court for arbitration.[3] The fact that this whip is in the hands of the President, to be used in the last resort, and that the party with the stronger position for the time being will have to submit to an award if he takes up an obstinate attitude against all agreement, is found to operate as a strong inducement to compromise and to reasonable arrangements by consent. Arrangements in lieu of award have often been fixed up in a conference or as the result of a conference.[4] The agreements are generally produced in Court when the case is called on, and the President certifies to them, and has them filed, and they operate, are enforcible, as an award.[5] In one long case, where the Court was faced with a dispute in ten tramway undertakings, no less than eight of the undertakings arranged agreements during the course of the long

---

Steamboat Engine-men, 6 C.A.R. 60 (1912); Bakers, 7 C.A.R. 257-8 (1913).

[1] Export Butchers, 4 C.A.R. 82, 87 (1910); Glass Bottle Makers, 6 C.A.R. 176 (1912); Steamboat Engine-men, 7 C.A.R. 37 (1913); Bakers, 7 C.A.R. 257-8 (1913).

[2] Export Butchers, 7 C.A.R. 52-54 (1913). [3] Sec. 19 *d*.

[4] Engine-drivers, 6 C.A.R. 126 (1912); Glass Bottle Makers, 6 C.A.R. 176 (1912); 7 C.A.R. 43 (1913); Seamen (as to manning), 7 C.A.R. 2 (1913); Journalists, 7 C.A.R. 112, 113 (1913); Liquor-trade, 6 C.A.R. 129 (1912); 7 C.A.R. 254 (1913).

[5] Sec. 24.

hearing, with the assistance of the President given in frequent interviews with the parties in chambers.[1]

It must not be supposed that the desire for the assistance of the President or of the Court is confined to employees. At first there was a tendency on the part of employers, individually and in association, to resent interference, as preventing the employers from carrying on, as they said, their own business in their own way. But the facts have been too strong for them. Employers now frequently request the President to intervene and to summon a conference in order to prevent a stoppage of work.[2] They seek regulation, by agreement or award, in order that they may not find their plant lying idle and their business at a standstill, and, in some cases, a season lost.

Perhaps it will be well to give a concrete case. There is, in Victoria, a great butchering trade in lambs for export, involving, I believe, more than a million pounds per annum. The lambs are sent down to Melbourne in the spring, September, or October; and unless they are butchered at once they deteriorate in condition and the season is lost. The men suddenly refused to go to work at the old rates; telegrams flew up to the country settlements to stop trucking any more lambs; the settlers were faced with the prospect of losing their market, and the storekeeping and incidental industries with the prospect of grievous loss. It so happened that the same demand was made on employers in New South

[1] Tramways, 6 C.A.R. 130, 140 (1912); and see Journalists, 7 C.A.R. 112, 113 (1913).

[2] Seamen, 4 C.A.R. 108 (1910); 5 C.A.R. 147, 154 (1911); Fruit-growers, 5 C.A.R. 37 (1911); Waterside Workers, 6 C.A.R. 3 (1912); Glass Bottle Makers, 6 C.A.R. 176 (1912); Liquor Trade, 7 C.A.R. 254 (1913); Export Butchers, 5 C.A.R. 52 (1913); Victorian Stevedoring Co., 5 C.A.R. 1 (1911).

Wales, so that there seemed to be a two-State dispute which gave jurisdiction to the President. A conference was summoned at the request of the employers, the men induced to go to work under the conditions already in operation on a promise that the Court would arbitrate and make the award retrospective to the resumption of work, and the season was saved.[1] The parties prepared themselves peacefully to discuss their differences before the Court, but—this is the point—*the work went on.*

Another concrete case, showing the desire of both sides for definite regulation of conditions by the Court, is that of the ship's officers. The men, in their demands, had been too specific; the High Court had decided that the dispute must be treated as confined to the specific demands made, and that the Court of Conciliation could not prescribe a remedy for any grievance different from that remedy demanded. The Court of Conciliation found that the granting of the demands, as asked, would tend to promote strife rather than peace in the industry, and stated its difficulties to the parties. Both parties were so anxious for a definite arrangement of conditions that they consented to embody in an agreement *any terms whatever that the President thought proper,* whatever the ambit of the dispute, whatever the jurisdiction of the Court. The President accordingly continued the hearing of the case and drew up an agreement which both parties signed and which they have both loyally observed.[2]

There is such a strong desire for the assistance of the machinery of the Act that on several occasions

[1] Export Butchers, 7 C.A.R. 52, 54 (1913).
[2] Ship's Officers, 4 C.A.R. 89, 91 (1910).

an attempt has been made by the employers, with or without the concurrence of employees, to induce the President to intervene in cases in which he has had to refuse his assistance, on the ground that the dispute does not extend beyond one State and must be dealt with, if at all, by State authorities.[1] Quite recently the President has had, however, to make an exception to his rule not to meddle, even by consent, with matters outside his jurisdiction. There was a dispute between labourers and artisans on the one side and the Commonwealth Government on the other, as to conditions of labour in the construction of a naval base in Western Port, Victoria; all parties signed a submission to arbitration, leaving everything to the determination of the President as in a voluntary arbitration. In view of the serious effects of a stoppage of the works in time of war, the President consented to act, heard the parties, and gave an award, and the parties are peacefully acting in accordance with it.[2]

But the course of the Court, like the course of true love, does not always run smooth. It has to meet some bitter opposition. Sometimes the opposition comes from a union of employees—generally, a union which avowedly accepts the doctrine of the "class war," and aims at "the emancipation of labour by the abolition of the wage system."[3] I have even seen a cartoon, in a labour newspaper, showing a labourer walking towards a gate marked "Freedom," and a bull-dog with a collar marked "Arbitration"

[1] Victorian Stevedoring Co., 5 C.A.R. 1 (1911); Hairdressers, 6 C.A.R. 1 (1912).
[2] Naval base—not reported.
[3] Fruit-growers, 6 C.A.R. 61, 65, 78 (1912).

bars his path. It is but fair to say that this cartoon appeared in a State which has a local Arbitration Court. But the attacks on the Court and its awards are, of course, generally made from the side of employers, many of whom naturally resent any curtailment of their powers. The applications for prohibition against the President have been sometimes in part or temporarily successful. Prohibition is applied for because of some alleged excess of the Court's jurisdiction, and the argument generally turns on the question, was there a dispute, and if there was, did it extend beyond one State? Sometimes the argument turns on the validity of some section of the Act. The proceedings are very long and very costly, and it is astonishing what a wealth of learning is involved in the meaning of the word "dispute" and the words "extending beyond the limit of any one State." The discussions occupy a very considerable proportion of the Commonwealth Law Reports, but they would not interest those for whose information I write this article. The legal discussions do not affect the principles or methods of action of the Court of Conciliation in cases where there is jurisdiction.

It has to be admitted that the awards, in nearly all cases, have been made in a period when the cost of living is rising and that therefore they have generally increased the existing minimum rate. The Court found, about 1911, that the cost of living was substantially increasing, but it refused to raise the basic wage until the increase could be quantitatively stated.[1] It suggested the expediency of official statistics on the subject, and the Commonwealth Statistician now furnishes periodically statistics which have materially

[1] Engine-drivers, 5 C.A.R. 9, 14, 16 (1911).

assisted the Court. According to the Commonwealth Statistician, the cost of living, taking Australia as a whole, has increased by 25 per cent. from 1901 to 1913. For such necessaries as could be bought in 1901 for £1, one must now pay 25s.[1] What will happen if the cost of living should decrease—if the minimum for the basic or living wage shall have to be lowered? It is a fair question, but it is for the future to give the answer. I wish to confine my words to my personal experience. Yet there have been cases in which the Court has refused increases or has actually decreased the minimum rates, and the employees have listened to the reasons and loyally submitted. In the case of the shearers,[2] the rates for shearing, 24s. per 100, as fixed by my predecessor, were not increased; and the strongest union in Australia, the Australian Workers' Union, acquiesced. In the same case, the Court found that too high minimum rates had previously been fixed for wool-pressers and lowered them, stating its reasons. There was no strike, no refusal to work, no expression, that I know, of discontent. In the case of the builders' labourers,[3] the Court fixed lower rates for Ballarat and Bendigo than for Melbourne, and lower rates for Melbourne than for Sydney, all because of differences in the cost of living. The union leaders were troubled because those cities had always maintained the same "union rate"; but they told the members of the union the Court's reasons, and there was peace. Again, in the same case, the Court fixed for Melbourne a lower minimum rate for scaffolders and

[1] Postal Electricians, 7 C.A.R. 5, 12 (1913).
[2] Shearers, 5 C.A.R. 48 (1911).
[3] Builders' Labourers, 7 C.A.R. 210 (1913).

demolishers than had been previously fixed by the wages board—1s. 3½d. per hour instead of 1s. 4½d. per hour; and the men submitted. The truth is, I think, that if the men secure the essentials of food, shelter, clothing, etc., they are not so unreasonable as is sometimes supposed. They do not love strikes for the sake of strikes; and the great majority are generally quite willing to submit to reason if they feel that they are reasonably treated.

This article is confined, as I stated at the beginning, to the Federal Court of Conciliation and to my own actual experience in connection therewith. But American readers should know that in each of the six Australian States there is some wages board system under the State law or some Industrial or Arbitration Court. Victoria was the first State to adopt a system of wages boards, about 1896; and her example has been more or less followed in Queensland, South Australia, and Tasmania. Western Australia has an Arbitration Court, and New South Wales has a combination of the two systems, wages boards and an Industrial Court. There is no organic connection between the State systems and the Federal system. The object of the wages boards is primarily to prevent sweating or under-payment; the object of the Federal Court is to preserve or restore industrial peace. The Federal Court deals with disputes, as such, and prescribes wages, etc., merely as incidental to the prevention or settlement of disputes; the wages board prescribes minimum wages and has no direct relation to disputes. But, as is obvious from the nature of the case, the systems often overlap. A wages board consists, generally, of representatives selected by employers and of representatives selected by em-

ployees in equal numbers, with a neutral chairman. There is not, I think, any fixed principle stated by the Legislatures for the guidance of the boards in prescribing the minimum wage. At one time, the Victorian Legislature enacted that the minimum wage should not exceed the wage paid by "reputable employers"; but this negative provision has been found unsuitable, and repealed. The wages boards cannot deal with all industrial conditions; the Federal Court can deal with any industrial condition that comes into dispute. The wages boards do not publish the reasons for their determinations; the Federal Court does. As a result I find that the wages boards frequently look for guidance in their action to the reasoning of the Federal Court. The wages boards, within the limits of area assigned to them, bind all employers by their determinations; the Federal Court can only bind those who are concerned in the dispute. The wages boards, being State creations, are very much affected by the consideration of inter-State competition.[1] In dealing with boot-factories, the New South Wales Tribunal would have fixed the minimum for journeymen at 9s. per day, but for the fact that the rival factories of Victoria had a minimum of 8s. per day. The Federal Court, when asked to intervene, was able, as an Australian tribunal, to bind the employers of both States to pay the 9s. per day.[2] Another weakness in the wages board system is that employees, in the presence of an employer or a possible employer, have not the independent position which would enable them to act fearlessly. This is especially the case where, as in the case of city tram-

[1] Engine-drivers, 5 C.A.R. 9, 17 (1911).
[2] Boot-factories, 4 C.A.R. 1, 8 (1910).

ways, there is only one undertaking where a tramway man can get employment. In the case of the Brisbane tramways it appeared that it was the manager who, as a member of the wages board, made all the proposals, and that every one of his proposals was carried unanimously.[1] Again, the decision of the wages board of one State is frequently inconsistent with the decision of the wages board of an adjoining State. There is no one final co-ordinating authority as in the case of the Federal Court, and the result is often that contrasts appear, and dissatisfaction arises, and industrial trouble. For instance, a large mining district, of essentially the same physical and industrial character, with the same cost of living, is divided by the artificial boundary line between two States. The wages board of one State prescribed one set of wages and conditions, the wages board of the other State prescribed a lower set. The consequences were disastrous.[2] A New South Wales wages board gave in the case of builders' labourers,[3] the lowest rate to scaffolders, and the highest to hodmen. The Victorian wages board gave the highest rate to scaffolders. The New South Wales board gave a low rate to demolishers; the Victorian board gave the highest rate. The Federal Court, when it came to act, prescribed a flat minimum rate for all the labourers, and the employees were satisfied. They knew that a man of exceptional value as a scaffolder or in any other capacity would still be able to demand and obtain a rate higher than the minimum. It is often said that the minimum rate tends to become the maximum, but there has

[1] Tramways, 6 C.A.R. 130, 149 (1912).
[2] Engine-drivers, 7 C.A.R. 132, 145 (1913).
[3] Builders' Labourers, 7 C.A.R. 210 (1913).

been no proof of such tendency as yet. Moreover, the wages boards are often not suitably grouped, and there is a tendency to ignore the interests of unrepresented minorities, of employers as well as of employees. For example, there was in Victoria a "hay, chaff, wood, and coal board," composed, as to employers, of ordinary wood, coal, and produce retailers. They managed to get a determination which kept their own yardmen at low wages, but fixed a disproportionately large minimum for yardmen who handled coke, because the Gas Company of the city was practically the only vendor of coke and it was not represented on the board.[1] But most of these defects, and other defects which I could point out, are not of the essence of the system and will probably be removed or obviated in the light of experience. Employers have assured me that they welcome the fixing of minimum rates by the boards or by the Court. They know now definitely what they must pay, and, so long as they pay it, they feel no more the incessant nagging of unions or employees as to wages. Nor can any impartial person deny the immense relief which the system of wages boards has afforded to thousands of the most helpless families throughout Australia. Wages boards constitute one of the most useful factors of those which tend, in the words of Russell Lowell, to "lift up the manhood of the poor" and to provide proper sustenance and upbringing for the children of the nation.

Perhaps I should add here that up to the present I have not been able to trace any increase of price of commodities to the fixing of minimum wages. It is not the function of the Court to ascertain the truth

[1] Gas Employees, 7 C.A.R. 58, 65 (1913).

as to the causes of increased prices, but the Court watches for any sidelights on this important subject. In one case, I believe, a wages board raised the wages of milk carters by 1s. per day and the milk vendors at once raised the price of milk by 1d. per quart. For 100 quarts per day, this would mean an increase of receipts to the amount of 8s. 4d. per day, so that the milk vendors had raised the price of milk far beyond the amount necessary to recoup them for the additional wages.

It will be asked, however, what is the net result of the Court of Conciliation? Have strikes ceased in Australia? The answer must be that they have not. There have been numerous strikes in Australia, as elsewhere. But since the Act came into operation there has been no strike extending "beyond the limits of any one State." Those who are old enough to recall the terrible shearers' strike and seamen's strike of the "nineties," with their attendant losses and privations, turbulence, and violence, will realize how much ground has been gained. The strikes which still occur are strikes within a single State, and disputes within a single State are outside the jurisdiction of the Court. It can be safely said that, since the Act, every dispute "extending beyond the limits of any one State" comes before the Court or the President, either on the application of parties to the dispute, or on the initiative of the officers of the Court.[1] Moreover, with the exception of one doubtful case, in which I was not personally concerned and do not know the full particulars, there has been no instance of an award being flouted by the employees, no instance of the employees refusing to work under an

[1] Sec. 19.

award. There have been cases in which parties have differed in the interpretation of an award in its application to exceptional circumstances; there have been instances of inadvertent disobedience; and these cases have sometimes come to the courts in the form of an action for a penalty. But these were cases in which the award was treated as regulating the rights of the parties, not treated as a thing to be rejected.

In 1911 Parliament entrusted to the Court another formidable function, the settling of wages, hours, and conditions of labour for Federal public servants. This function does not rest on the constitutional power to make laws for conciliation and arbitration in industrial disputes;[1] it rests on the absolute power of the Commonwealth in relation to its own servants. The public servants are allowed to group themselves in unions, "organizations," as they think fit, and to approach the Court with a plaint. It seems at first sight curious that Parliament should entrust any tribunal with a power of adjudicating on such subjects, but Parliament has been careful to retain the final control of the Commonwealth finances. For the award does not come into operation till the expiration of thirty days after it has been laid before both Houses, and Parliament can, if it sees fit, pass a resolution disapproving of the award. This remarkable jurisdiction over public servants deserves a study all to itself, and I can only say, though there have been several important awards under it, no award has yet met with the disapprobation of Parliament and no resolution of disapproval has ever been tabled.

In conclusion, I may state that I am not unaware

[1] Sec. 51 (XXXV.).

of the far-reaching schemes, much discussed everywhere, which contemplate conditions of society in which the adjustment of labour conditions between profit-makers and wage-earners may become unnecessary. Our Australian Court has nothing to do with these schemes. It has to shape its conclusions on the solid anvil of existing industrial facts, in the fulfilment of definite official responsibilities. It has the advantage, as well as the disadvantage, of being limited in its powers and its objects. Its objective is industrial peace, as between those who do the work and those who direct it. It has no duty, it has no right, to favour or to condemn any theories of social reconstruction. It neither hinders nor helps them. But it is obvious that even if all industries were to be carried on under State direction, industrial peace would be as vitally important as it is now, and that it could not be secured without recognition of the principle which the Court has adopted, that each worker must have, at the least, his essential human needs satisfied, and that among the human needs there must be included the needs of the family. Sobriety, health, efficiency, the proper rearing of the young, morality, humanity, all depend greatly on family life, and family life cannot be maintained without suitable economic conditions. The reasoning which has lately committed to the Court the function of settling conditions of labour for public servants would not be less, would be even more applicable, if the State had more servants than it has.

Yet, though the functions of the Court are definite and limited, there is opened up for idealists a very wide horizon, with, perhaps, something of the glow of a sunrise. Men accept the doom, the blessing of

work: they do not dispute the necessity of the struggle with Nature for existence. They are willing enough to work, but even good work does not necessarily insure a proper human subsistence, and when they protest against this condition of things they are told that their aims are too "materialistic." Give them relief from their materialistic anxiety; give them reasonable certainty that their essential material needs will be met by honest work, and you release infinite stores of human energy for higher efforts, for nobler ideals, when

"Body gets its sop, and holds its noise, and leaves soul free a little."

CHAPTER II.

AN ARTICLE CONTRIBUTED TO THE *Harvard Law Review*, PUBLISHED JANUARY, 1919.

UNDER this name there appeared in this review in November, 1915, an article written by me at the instance of the editor. It gives in a summary form the results of my experience as President of the Australian Court of Conciliation and Arbitration. As the article seems to have attracted some attention in America, and also in Great Britain and Australia, it may not be amiss to report progress after three more years; especially now that a national labour administration has been created in the United States in the charge of my friend Professor Frankfurter.

This Court has not to deal with mere theories. It does not work in the air—in the cloud-cuckoo town of Aristophanes. As I said in 1915, the Court "has to shape its conclusions on the solid anvil of existing industrial facts, in the fulfilment of definite official responsibilities. It has the advantage as well as the disadvantage of being limited in its powers and its objects."

I propose to make this article supplementary to the former. I have found that in Great Britain as well as in America the idea of compulsory arbitration is repugnant to the leaders of the working class, whereas in Australia, facing different stars, the opposition comes principally from the class of

employers. In the earlier years of my work I received through the post many insulting anonymous letters, most of which I have kept as curiosities, and nearly all these letters came from partisans of the employers. The party with a stronger economic position naturally wants to be free to act as it thinks fit; it objects to be bound by orders from outside. The Act makes it the first duty of the Court to endeavour to get agreement on the matters in dispute and to exercise its compulsory powers only when an agreement is impossible; but when the party with a stronger economic position refuses to agree on lines of justice instead of economic strength the Court has to interfere by dictating terms such as would, in its opinion, be just in a collective agreement. The ideal of the Court is a collective agreement settled, not by the measurement of economic resource, but on lines of fair play. The stronger economic position is usually held, of course, by the party which has the right to give or withhold work and wages, the means of livelihood. It is usually held by the employers. This is the reason why the awards necessarily operate more frequently as a restraint upon employers than as a restraint on employees.

I desire to deal in particular with the constructive part of the work of the Court. The awards have to be framed on some definite system, otherwise in getting rid of one trouble you create many others. Some years ago a friend, who had had on one or two occasions the function of reconciling parties to industrial troubles, told me that he had found it best to put the leaders into a good humour by getting them to dine together with him and to have a

friendly chat. A veteran leader of the shearers has written a book, in which, with much *naïveté*, he recommends in the first place that leaders of workers in conferences with employers should first adduce the solid arguments, and then in the last resort make a powerful appeal on behalf of the women and children—"give them the women and children hot." Neither of these courses is permissible for the Court which has to deal, not with single isolated disputes, but with a series of disputes. The awards must be consistent one with the other, or else comparisons breed unnecessary restlessness, discontent, industrial trouble. The advantages of system and consistency in the awards are increasingly apparent, as parties, knowing the lines on which the Court acts and understanding its practice, often now make agreements in settlement of a dispute in whole or in part without evidence or argument.[1] The agreement, if certified by the President and filed in the Court, is deemed to be an award. (Sec. 24.)

In the previous article I have set forth a goodly number of propositions laid down by the Court, and on looking through them I cannot find that any of them have been overruled or set aside. They have been amplified and applied to varying circumstances, and new propositions have been added. The claims for the assistance of the Court have been so numerous that my colleagues of the High Court have come to my assistance, and in particular Mr. Justice Powers, acting as Deputy President. Although Mr. Justice Powers has had an absolutely free hand in dealing with the disputes which he undertakes, I do not think

[1] *Cf.* Engine-drivers, 8 C.A.R. 206; Tramways Employees 9 C.A.R. 208; Marine Stewards, 10 C.A.R. 539.

that in any essential or substantial point he has seen fit to reject any of the propositions; but as I must take the sole responsibility for any statements made in this article I confine myself to a review of the position as it stands under my awards.

Minimum Wage.

The Court adheres to its practice of dividing the minimum wage awarded into two parts—the "basic wage"—the minimum to be awarded to unskilled labourers on the basis of "the normal needs of an average employee regarded as a human being living in a civilized community;" and the other, the "secondary wage"—the extra payment to be made for trained skill or other exceptional qualities necessary for an employee exercising the functions required.

A curious controversy arose in 1915 as to the effect of awarding a minimum rate. The Act allows the Court (Sec. 40) to prescribe a minimum rate, but does not mention a maximum rate, and one would have thought it sufficiently obvious that there is no breach of an award on the part of a worker if he declined to take employment at the minimum rate prescribed. The contrary view, however, has been hotly urged, and some partisans of the employers, newspapers and others, have gone so far as to call it a "strike" when men refused to accept work which is offered at the minimum rate. In Webster's dictionary "strike" is defined as "the act of *quitting* work; specifically such an act by a body of workmen done as a means of enforcing compliance with their demands made on their employers." But our Act is clear on the subject. According to Section 4, "strike" includes the total or partial *cessation* of

work by employees acting in combination as a means of enforcing compliance with the demands made by them or other employees on employers. The question first arose in connection with "special cargoes" in the case of the Waterside Workers (called, I believe, in America, "longshoremen"). These men were casual labourers hired by the hour. They turned up at the wharf when a vessel arrived and the foreman made his selection. The minimum rate prescribed was 1s. 9d. per hour. The union had claimed that wheat should be treated as a special cargo, so that the wheat-carriers should be entitled to a minimum rate of 2s. per hour. The Court had refused this claim, as there seemed to be no sufficient difference between wheat and other commodities for the purpose of a *minimum* rate. But it appeared that certain members of the union had adopted the practice of following the wheat ships from north to south, and having acquired a certain dexterity in the handling of wheat, had succeeded with some employers in enforcing the payment of 2s. per hour. Under the exigencies of the war the various wheat States had formed wheat pools, and the State Governments were quite willing to pay the extra 3d. per hour in order to get the services of these men in loading the ships for export to Great Britain; but they did not like to pay the extra 3d. in the face of the decision just given by the Court. The Court reassured the employers of the wheat pool thus:[1]

"It is not necessarily an unjust extortion for a man or a class of men who make wheat-carrying a speciality to demand more than the minimum rate for his or their services. It is quite in harmony with the

[1] Waterside Workers, 9 C.A.R. 315; 10 C.A.R. 1.

principle of freedom of contract subject to the minimum wage that an employer should seek by extra wage to attract men who, as he thinks, will give him extra speed and efficiency. The device of a minimum wage will soon prove to be a bane instead of a blessing if the position be perverted as the arguments tend to pervert it. I can only say plainly that there is no breach of the award or impropriety in a man refusing his services in loading wheat unless the employer pay him more than the minimum. It is all a matter for contract."

The extra 3d. was paid. The wheat was loaded and carried to the Allies, while at the same time no obligation was imposed on all the exporters for the term of the award to pay a minimum rate of 2s.

The doctrine, however, which now appears to be a mere truism, was attacked by certain newspapers and employers in a tirade of abuse. The men, it was said, were actually encouraged by the Court to "strike" for higher wages. Even if the legal position were clear the Court was not justified in stating it, in suggesting higher demands; and so forth. However, I took the first opportunity of stating a case on the subject for the opinion of the High Court; and the High Court, by a unanimous decision, upheld the doctrine.[1]

It would, of course, be an astounding position if, while the employer remains free to give or to refuse employment at the minimum rate, the employee were bound to take employment at that rate. The employer has the formidable power of refusing to give work to any particular man, the power even to put an end to all his own business operations; why

[1] Waterside Workers, 21 C.A.R. 642.

should not the employee be free to refuse to take work? A minimum rate is in effect a restraint upon the employer; a maximum rate would be in effect a restraint upon an employee. The Act gives power to prescribe a minimum rate, and the object of that power would be defeated if a man who thinks that his services are worth more than the minimum rate were not free to hold out for a higher rate. Some employers pay more than the minimum for the avowed purpose of attracting the best men. Incidentally it may be remarked that the position as now settled here is very far from justifying the fears of those who look on provisions for minimum rates as tending to the establishment of a "servile State." Mr. Belloc's dogma ("The Servile State," p. 172), that "the principle of a minimum wage involves as its converse the principle of compulsory labour," is not confirmed by such experience as I have had.

The statement has often been made that the minimum rate tends to become the maximum rate. I have not found it so. It is quite true that far more employees get the minimum rate prescribed than got it before the rate was fixed, for before that time they usually got varying rates, mostly below the minimum. I have not found unions objecting to members taking extra pay for extra usefulness; for instance, in building operations an expert scaffolder often claims, and gets without objection, a higher rate than the flat minimum prescribed; and leading hands in a labouring process often get higher rates than their mates;[1] but unions object to extra rates for extra servility, for disloyalty to one's comrades.

[1] Broken Hill, 10 C.A.R. 200-201.

Offensive Jobs, etc.

Connected with this doctrine are the propositions that the Court does not attempt to discriminate in minimum rates on the ground of comparative laboriousness, and that the Court will not prescribe an extra minimum to compensate for unnecessary risks to the life or health of the employee, or for unnecessary dirt (propositions 12 and 19 of the previous chapter). For instance, members of the Amalgamated Society of Engineers failed to get an increase of rate under the name of "dirt money" when handling dirty work. That is to say, the Court refused to increase the *minimum* rate prescribed.[1] So, too, in artificial manure works, the employees asked for an increase in the minimum rate because of dust and fumes. It was said that dust affected the air passages and produced catarrh, etc.; but there was no evidence to show how far, if at all, the dusty conditions operated to reduce the effective wages. The Court was unable to express the injury in terms of money. Of course, if the subject of defective arrangements under which dust is produced come before the Court directly as a grievance for regulation, the Court would have to decide the matter as best it could; but employers must not be allowed to purchase by money a right to injure health. The same principles are applied to cases of excessive strain on employees, as by excessive weights or excessive use of certain muscles or injury to clothes:

"This Court tends rather to refuse to make differentiation in minimum rates except for clearly marked distinctions and qualifications such as crafts-

[1] Broken Hill, 10 C.A.R. 155.

men's skill or exceptional responsibility or special physical condition necessary for the operation. . . . Differentiation in minimum rates prescribed must be made on broad lines."[1]

On the same grounds the Court expressed disapproval of the system of extra minimum rates for special cargoes handled by waterside workers. When one special cargo was conceded by another tribunal there were incessant efforts to make more cargoes special, until at last the complaint was that all cargoes should be special except case goods. No subject has caused more incessant friction. There can be, however, no objection to a man refusing to accept employment for a cargo which injures his health or is beyond his powers, or if he think that he ought to get a payment beyond the minimum. Beyond the minimum there is ample area for free bargaining.

Regulation of Employer's Methods.

But although the Court does not prescribe a differential minimum rate on the ground that a job is offensive or distressing, it has sometimes to award directly on the subject when it is made the ground of a substantive dispute. For instance, the waterside workers complained that the weights put upon them to carry or to wheel were too heavy; and the Court prescribed a maximum of 1 cwt. for bagged ore to be lifted, a maximum of 5 cwt. for one man using a two-wheeled truck (the truck itself weighs 2 cwt.), a maximum of 200 lbs. for bagged cargo to be carried, a maximum of 15 cwt. for two men using a trolley.[2]

[1] Artificial Manures, 9 C.A.R. 187-189.
[2] Waterside Workers, 9 C.A.R. 305-309.

There were certain exceptions made. It was recognized also that the weight might vary with the condition of the wharf; and, above all, there was no appropriate scientific evidence of the kind that is collected in the excellent work of Miss Goldmark on "Fatigue and Efficiency." But interference on such subjects is rare. It is well known that the Court is very chary about dictating to those who have to direct the work as to the mode of carrying it out (see proposition 30), and that it will not dictate conditions unless it be clearly shown that the mode adopted involves undue pressure on human life. The Court usually refuses to prevent the employer from having the work done as he thinks desirable for his undertaking,[1] or to dictate the number of men to be employed,[2] or to alter the functions of the respective officers,[3] or to prevent an employer from calling on an employee to work extra hours if paid substantial extra rates,[4] or to prevent coastal vessels from being at sea on Sundays,[5] or to prescribe the number of retorts to be drawn and charged by a stoker in his shift,[6] or to interfere with the choice of men for appointment or promotion. The Court does not favour the arbitrary limitation of the proportion of boys to adults if the employer finds that boys will answer the purpose of his undertaking as well as men, and especially if he bind himself to teach the boys a definite trade. But the position is different if the boys would not be employed for certain heavy or risky work except for their wages being lower—if the employer would not

[1] Pastoralists, 11 C.A.R.
[2] Marine Engineers, 10 C.A.R. 528.
[3] Postal Electricians, 10 C.A.R. 578.
[4] Merchant Service Guild, 10 C.A.R. 673.
[5] *Ibid.* 214.
[6] Gas Employees, 11 C.A.R.

employ boys but for the cheaper rate.[1] In one case the Court refused to exempt any boys from the minimum adult wage unless they were properly apprenticed.[2] Similar principles are applied in the case of women. If women are put to work more suited for men, as that of a blacksmith, or even to work for which men are equally suited, the woman must get a man's minimum.[3]

Directors of Industry.

The Court does not ignore, however, the increasing demand of employees for some voice as to the conditions of working, the uneasy feeling that the employers, or rather their foremen, have an autocratic power which is too absolute. Wages and hours are not everything. A man wants to feel that he is not a tool, but a human agent finding self-expression in his work. The Court tries, therefore, to encourage by all the means in its power the meeting of representatives of the unions with representatives of the employers. Such meetings produce a good effect, even when the employers adhere to their methods, giving their reasons. Fortunately there is no difficulty as to recognition of the unions. The unions have come, and have come to stay. Our Act could not be worked without unions. One of the chief objects of the Act is, under Sec. 2, "To facilitate and encourage the organization of representative bodies of employers and employees, and the submission of industrial disputes to the Court by organizations." Now the Act (Sec. 40A) enables the Court to appoint "Boards of

[1] Linemen, 10 C.A.R. 602, 613.
[2] Butchers, 10 C.A.R. 465, 495.
[3] Fruitgrowers, 6 C.A.R. 61, 71.

Reference," and such boards involve opportunities for meeting for discussion of methods and alleged grievances. The difficulties which the Court has to face as to such boards appear in a passage in a judgment of last year, a passage which I take the liberty of setting out:

"The most serious difficulty that I see in the agreement and in this award is the absence of the provision of a board of reference—a board in which the employer and the employed could take counsel together for the purpose of dealing with any grievances which employees allege and which the directors and managers, owing to their remoteness from the stress of actual operations, cannot realize. It is one of the signs of the times, of which employers would do well to take heed, that the workers are gravely dissatisfied, because they have no voice whatever in the regulation of the conditions under which they spend so much of their lives; that their opinions as to the possibility of preventing unnecessary hardship are not to be treated as being of more account than as if they were engines or horses.

"Many a grievance, or supposed grievance, would be removed before it developed into a serious trouble by a proper board of reference. I have hoped and worked for an agreement for such boards in this case, one at least for each undertaking; but the parties cannot agree as to the conditions. The companies want to insert a provision that before a grievance can come before the board of reference it must be brought by the individual employee before his foreman or immediate superior. The union desires that the grievance shall be brought before the management by the works committee of the union, and then,

if necessary, before the board of reference; but it is willing, as a compromise, to agree that either the individual or the board may approach the management. The companies unite in insisting that the individual employee must first make the complaint. Such a provision was not in the agreements of 1913, and there is no evidence that the lack of it has had any ill-effect. But the companies are firm on the subject. It is suggested that I should exercise my power under Sec. 40A to appoint a board of reference. That section enables me to assign to a board the function of dealing with "any *specified* matters or things which *under the award or order* may require from time to time to be dealt with by the board." Unfortunately these words mean, according to a majority of the High Court, that I must specify now, in my award, the specific grievances which the board may deal with (Federated Engine-drivers *v.* Broken Hill Company, 16 C.L.R. 245). Apparently it is not enough for me to commit to the board all or any matters which may arise—even arise under the award or order. As I have said in previous cases, it is impossible for me to specify beforehand the grievances which will arise or be alleged. Whether the view of the High Court is correct or not, I shall obey it. I had hoped that Parliament would have come to the assistance of the Court by an amendment of the section, but it has not done so. I cannot make use of the section, at all events, so as to meet the circumstances of this case."[1]

The fundamental difficulty of the position seems to be that the employer and the union look at the methods used from different points of view. The employer—generally a company acting through direc-

[1] Gas Employees, 11 C.A.R.

tors—looks at money results, at profits, at expenses. The union looks at the results to the human instrument. Both sides of the subject ought to be considered. It is significant that the unions are always willing to have such boards, and the Court often manages to get an agreement on the subject. The board of reference has been the only means within the power of the Court for meeting the increasing demand to which I have referred. It meets the demand to a certain extent, and tends to further developments.

How the Basic Wage is Found.

The "basic" or living wage, the minimum wage for the unskilled worker, is the primary factor in the fixing of all wages by award; and the fixing of the proper basic wage is necessarily of an importance that can hardly be exaggerated. It must vary with the cost of living in the various districts; for instance, the basic wage for the seaports would not be a proper basic wage for inland mining districts such as Broken Hill. But sometimes by general consent a uniform basic wage is desirable, as in the case of the waterside workers or seamen; and the Court then takes as its guide the mean cost of living for the several ports. In such cases it becomes possible to form some idea of the immense sums which an award of the Court may transfer from the employing (or the consuming) class to the employed. An increase of 1s. per working day for 10,000 men means an increased expenditure of £156,500 per annum; and there were about 17,000 men in the unions of waterside workers. In that case arbitration was sought by about 150 em-

ployers—trading oversea, inter-State, within the State. Not only in the vastness of the sums involved, but in the effects on families and the proper nurture of children, and in indirect consequences in all employments, the responsibility of the Court is very grave. The decisions of the Court probably affect directly more human lives than the decisions of all the other Courts. The Court has repeatedly invited full enquiry on scientific lines as to the cost of living, but neither the Government nor the parties have yet responded. Preferably the enquiry should be made by expert statisticians and on the basis of distinct regimens, but the responsibility of fixing the basic wage should be left with the Court. In the meantime the Court has been obliged to work out the problem on the best materials that it can get. At present the Court takes as *primâ facie* evidence the findings as to the cost of living on then existing habits in Melbourne in 1907, and then it takes the statistician's figures as to the depreciation in the value of money as against commodities as *primâ facie* evidence of the increase in the cost of living. The Commonwealth Statistician has found that in Melbourne it took in 1916 26s. 6d. to purchase commodities that could be purchased in 1907 for 17s. 6d., and the decrease in the value of money is nearly the same elsewhere. That is to say, the increase in the cost of living is over 50 per cent., chiefly owing to the existing state of the war.

It is a curious fact that there has been little or no attack on the empirical finding of 1907 as to the actual cost of living. Employers generally admit that the amount of 42s. per week was fair at that time; but there have been of late strenuous attacks

on the Statistician's figures of increase. The Statistician has taken some forty-seven staple articles of food and rent as consumed by all classes of the community, and has found the changes in price of those articles; and he very properly adheres to the same articles and assumes that they are consumed in the same quantities. He does not, as some people fancy, pretend to show the cost of living in a wage-earner's family; but he shows the depreciation in the value of money as regards the selected commodities, and, as he says, "in normal circumstances properly computed index numbers of food and groceries and house rent combined form one of the best possible measures of those variations in the purchasing power of money which affect the cost of living." Then the Court comes in, and, *until the contrary be shown*, infers that the depreciation in the value of money which is found in relation to the selected commodities is to be found also in relation to the other commodities. The method is in accordance with the views and intentions of the Statistician; for he says "once a standard of living or living wage has been fixed, the tables published . . . can be legitimately used as showing the variations in the cost of living." No party is bound by these tables as by a matter of absolute irrefutable law, but they are on the right method, and the Court makes use of them until it can find better evidence.[1] The criticisms made hitherto on the Statistician's findings are made under a misapprehension.

It is the practice of the Court to let no considerations of competition with foreign countries reduce

[1] Butchers, 10 C.A.R. 477-484; Merchant Service Guild, 10 C.A.R. 225; Gas Employees, 11 C.A.R.

what is found to be the proper basic wage;[1] and this practice, it must be admitted to the credit of the employers, has never been disputed so far as I know. The proper sustenance of the persons employed (on the basis of family life) is treated in effect as a first charge on the product.

Secondary Wage.

With the secondary wage the position is different. There is more scope for compromise or arrangement. At the same time it has been found inadvisable except in extreme circumstances to diminish the margin between the man of skill and the man without skill. One of the drawbacks of industry in Australia is that the lads do not learn their trades thoroughly—do not take the trouble to become perfect craftsmen. There is a tendency to be content with imperfect workmanship; to put up with the "handyman," and his rule of thumb: to put up with what is "good enough"; and nothing should be done by the Court which would lessen the inducements to learn a trade and to learn it properly.[2]

However, when the Court has increased the basic wage because of abnormal increase of prices due to the war it has not usually increased the secondary wage. It has merely added the old secondary wage, the old margin, to the new basic wage. It is true that the extra commodities which the skilled man usually purchases with his extra wages become almost as indispensable in his social habits as the commodities purchased by the unskilled man, and have no less increased in price; but the Court has not seen fit to

[1] Marine Engineers, 10 C.A.R. 532.
[2] Butchers, 10 C.A.R. 485.

push its principles to the extreme in the abnormal circumstances of the war, and the moderate course taken has been accepted without demur. I may add here that the Court, where necessary, adopts gradations in the secondary wage. For instance, after fixing the basic wage for unskilled labourers in the gas employees' case, it awarded 6d. per day for men classed as skilled labourers, 1s. per day more for men in charge of plant, etc., 2s. per day more for men of necessarily exceptional physical qualities, etc., such as stokers, and 3s. per day more for artisans fully trained.[1] The margin between the basic and the secondary minimum follows the margin usually adopted in the time of unregulated practice.

Hours.

With regard to hours of work, the Court generally adheres to the Australian standard of forty-eight hours per week. Any overtime has to be paid for at higher rates; but there are some exceptions to the forty-eight hours' rule. Fewer hours have been prescribed where the occupation is very nerve-racking; where, as in the case of the builders' labourers, the men have to "follow the job"; and now in the case of underground mines and smelters.[2] It may interest American readers to know that as to underground mines and smelting the Court availed itself of the reasoning of the Supreme Court of the United States in the constitutional case of Holden *v.* Hardy (169 U.S. 366). In that case a State statute limiting the hours in mines and smelters was upheld, notwithstanding the 14th Amendment of the Constitution,

[1] Gas Employees, 11 C.A.R.
[2] Broken Hill, 10 C.A.R. 155, 185-191.

because the State Legislature had regarded the limitation as conducive to health and life. The work was not only risky but also unhealthy. Lead poisoning and pneumonia were common. Special mention ought to be made here of the conduct of the men at the Port Pirie smelters. The lead ore which comes from Broken Hill is smelted at Port Pirie, and the produce is sent during the war to the British Government. The men were working seven shifts of eight hours, Sundays as well as ordinary days, and they had been for years seeking a six-day week on a rotation scheme; but they recognized that there was a shortage of men suitable for smelters, and that without the fifty-six-hour week the continuous process could not be kept up. So they asked me to postpone the boon of shortening hours till after the war. They did this as a gift to the nation for the purposes of the war, not under compulsion in the interests of the employers.

On the other hand, the forty-eight-hour week is not a rigid rule for all occupations. Sometimes the Court has fixed fifty-two hours where the nature of the trade required it, and where the operation has variety and is of an open-air character, as in the case of certain carters and drivers.[1] In the case of station hands (boundary riders, bullock drivers, and generally useful men employed by pastoralists) it was found impracticable to set any definite limit to the hours except for those men who were employed at or about the homestead; and in the case of the latter class the hours were fixed at fifty-two with the general assent of employers.[2]

In connection with the subject of hours I may

[1] Butchers, 10 C.A.R. 496. [2] Pastoralists, 11 C.A.R.

mention two curious facts tending to show a positive increase in efficiency and in results arising from well-regulated pauses in muscular exertion. In some industries—that of the waterside workers, for instance —"smokos" have for many years been permitted in Australian practice. I have been unable to find any analogue in America or in Europe. A "smoko" is a cessation for a short rest period in a run of work, a pause usually given without reduction of pay, and experienced managers and foremen have assured me that the "smoko" actually helps the working results. The men work with "more heart." They take a "snack," or a "pull" at their pipes. With the consent of the employers the Court prescribed two night "smokos" of half an hour each; but as a day "smoko" would in many ports interfere with the work of the carters the matter of day "smoko" was left to the discretion of the employers.[1] Another fact is that in shearing operations where there are piece-work rates, so much per hundred sheep, the employers actually sought for more pauses in the work than the union. Yet the employers' interest is clearly on the side of brief time of shearing, for the overhead expenses and the wages of men on daily wage run on all the time. The union asked for two four-hour runs of work between 8 a.m. and 5.30, with one meal between the runs, instead of six runs with two meals and three "smokos" interposed between 6 a.m. and 6 p.m. The Court prescribed as requested by the employers.[2] The case of the water-side workers is a case of payment by time, and yet the employers prefer to allow a pause, a deduction from the time sold

[1] Waterside Workers, 9 C.A.R. 293, 300, 317.
[2] Pastoralists, 11 C.A.R.

to them. The other case is one of payment by result, piece-work. Piece-work tends to speed, but tempts to imperfect workmanship; time-work tends to proper care, but tempts to slowness. In certain metropolitan abattoirs the manager prefers time-work with a tally of fifty-nine sheep per day, although in export meat works the average tally is eighty to a hundred a day.[1] In the shearing of sheep of exceptional value it is usual for the employer to prefer payment by time wages. In piece-work slaughtering the inducement of greater pay was not sufficient to prevent the union from asking for shorter hours. The employers opposed, but they have a quaint device called "the clock." The foreman tells the leading hand, the "clock-man," at what rate per hour he wants the slaughtering done; and the employers say that this course is taken to prevent the men from absenting themselves as a consequence of over-exertion, as well as to insure that the flesh, pelt, etc., are not injured by too furious a use of the knife. Speed for the day is not the only thing to be considered.

Stoppages.

The disputes brought under the attention of the President or Deputy President, or under the cognizance of the Court, since it was started in 1905, are very numerous. There must be several hundreds apart from incidental applications, and the points in dispute might almost be called infinite. The operations of the Court now occupy most of the time of two High Court Justices, but the expenditure of time and labour will probably be thought a good investment. For, though the disputes dealt with are

[1] Butchers, 10 C.A.R. 491.

many, the stoppages of work are very few; and it is the prevention of stoppages in operations required by the public that is the object of the power given by the Constitution. The work of the country must be carried on. The community requires that what it needs shall be continuously supplied, and to that end it provides for the redress of alleged grievances a tribunal which should render stoppages unnecessary. In a free country people may think they see the way to a better industrial economic system, and they may work towards that system, but in the meantime food, clothing, and shelter must be provided, and other commodities. The need for the day's food and supplies "subtends a greater angle" for the time being (the expression belongs to O. W. Holmes, I think) than all our theories, and above all the needs of those who are dearest to us, as the most helpless—the children. Their constitutions and the future of the race must not suffer by privation. Men have ever to

> "Keep the young generation in hail
> And bequeath them no tumbled house."

In other words, the people are consumers as well as producers, and the object of the power in the Constitution is primarily to protect the people as consumers, and, as incidental to that end, to provide means whereby producers can have their legitimate human needs satisfied without recourse to stoppages. There should be no more necessity for strikes and stoppages in order to obtain just working conditions than there was need for the Chinaman of Charles Lamb to burn the house down whenever he wanted roast pork. The arbitration system is devised to provide a substitute for strikes and stoppages, to

secure the reign of justice as against violence, of right as against might—to subdue Prussianism in industrial matters. Unfortunately the public do not know all the disasters from which they have been saved by the machinery of the Court. They "do not see because they do not feel." They know the inconveniences to which they have been put, but they do not realize the inconveniences from which they have been saved. In one case, for instance, little noticed, some of the principal cities would have been left without light but for the interposition of the Court.[1] However, something may be learned from a comparison. In Great Britain, according to Mr. G. D. H. Cole ("The World of Labour"), the Board of Trade, acting under the Conciliation Act of 1896, dealt with 597 cases up to the end of 1912, and of those 292 involved stoppages; and in 1912 of the 73 cases, 34 involved stoppages. That is to say, stoppages occurred in nearly half of the disputes handled. In the case of the Australian Court I can recall only two stoppages extending beyond the limits of any one State in disputes so extending; and yet during the same period strikes in local disputes, outside the competence of the Court, have been very numerous. People here know what a gain there is in the fact that there have been no such social upheavals as occurred in connection with the shearers and the shipping employees before this Court was constituted. The men know well that they cannot get arbitration if at the same time they try to enforce their demands by stoppage of work. They cannot have arbitration and strike too. I find that in the previous article I stated that since the Act came into operation there

[1] Gas Employees, 11 C.A.R. —

had been no strike extending beyond the limits of any one State. That cannot be said now; but the exceptions are worthy of study.

The first was that of the coal miners at the end of October, 1916. About 80 per cent. or 90 per cent. of the coal miners are in New South Wales, but the miners of Victoria and of Queensland had joined those of New South Wales in a federation. At the request of the federation the President held a conference in June, 1916. The principal subject of dispute was a claim for eight hours bank to bank, and no agreement was reached; but certain concessions were accepted to tide over the time till arbitration, and the President promised to give the case, for certain reasons, precedence; but when the case came on it appeared that in several of the mines the men were taking the hours which they sought. The union officials were not obeyed. The Court refused to proceed with the arbitration until the men resumed the former hours: "I shall certainly not go on with arbitration with my hands tied, and my hands would be tied if the men were getting by direct action . . . that which they are asking me for."[1] There followed several adjournments with the view of allowing the officials of the federation to use persuasion, but the matter was complicated by the bitter opposition of the unions to the proposal for conscription, and by an extraordinary antipathy to the Prime Minister, Mr. Hughes. They passed resolutions not to work except on the conditions named, and the work was stopped on or about the day of the referendum. The position was very serious. The stocks of coal available for the gas companies were running very

[1] Coal and Shale Employees, 10 C.A.R. 246.

low, especially in Sydney. The Prime Minister held a series of conferences, in which he found that the miners were firm in their refusal to work unless they got the eight hours bank to bank, and the employers insisted that if this concession were granted they would have to raise the price of coal. The Prime Minister asked the President to deal with the case as under a recent War Precautions Regulation (of doubtful validity), and, as incidental to the concession as to hours, to find what additional price the mine-owners might charge for coal. All such proceedings were outside my proper functions, but, as the Prime Minister was in great difficulty, I was willing to enter upon the enquiry as to the claim for the eight hours under our own Act—not at the instance of the union, but on the application of the Prime Minister, and if the mine-owners concurred. But I stipulated that my hands must be free either to grant or refuse the eight hours as should seem just. The Prime Minister then, by other machinery—assuming it to be valid—caused the claims of the miners and the mine-owners to be granted without evidence and without argument as to the eight hours, the union undertaking that there should be no further trouble during the war. It is not seemly that I should make use of this review for the purpose of putting my view of the action of the Prime Minister, but those who care to follow the controversy will find it in the 11th or 12th volume of the Reports of the Court. The consequences of the action were certainly disastrous. The union failed in its undertaking; there were frequent local stoppages; and at last, in August, 1917, the men of the union, with the approval of their leaders, struck work in sympathy with the railway employees of New South Wales—of which

I shall say more presently. This Court, at all events, was preserved from a course which would have fatally injured its character and its influence.

The second case occurred about June, 1917. The glass bottle makers of three cities suddenly struck work. At the request of the employers the President called a conference. The dispute was as to payment for defective machine-made bottles. Nothing would induce the men to return to work unless their demand was conceded. According to their leaders, the men thought that the employers would yield rather than have their furnaces extinguished and their plants idle, but the employers did not yield. The President gave his sanction to a prosecution for penalties. Certain penalties were imposed, and the men had to return to work on the employers' terms. A refusal of this kind to accept arbitration is unprecedented, and I have not been able to understand it, unless it be an explanation that the industry depended on imported German or Austrian glass-blowers.[1]

In addition to these two cases there has been a "sympathetic strike" on the part of a registered union; but it was not in support of any dispute of which the Court could take cognizance. In August, 1917, there was a strike of engineers and others in the State railway works of Sydney. The engineers struck work because the Railway Commissioner of New South Wales (the railways belong to the State) was introducing a card system for recording the time taken by each man in several operations. Then the other railway men, engine-drivers, stokers, etc., struck in sympathy; next the Sydney tramway men (Government tramways); then the coal miners; followed by

[1] Glass Bottle Making, 11 C.A.R.

the water-side workers, the seamen, and so on. The strike of the waterside workers extended to the principal ports of Australia. The waterside workers were actually working under an award of the Court; yet it is surely significant that the alleged grievance from which this general strike started was not within the competence of this Court, could not be handled by this Court under the law: for two reasons, each sufficient in itself. (1) The dispute as to the card system was a dispute between a State "instrumentality" and its employees; and, according to a decision of the High Court given in pursuance of the American doctrine of McCulloch *v.* Maryland, etc., this Australian Court of Conciliation cannot touch a State "instrumentality."[1] (2) The dispute as to the card system was confined to one State. It is not even an offence under our Act for men to strike on account of a dispute as to an industrial matter if the dispute be confined to one State.[2] It appears that the leaders of the railway men in Sydney asked the Government to refer the dispute to the Arbitration Court of New South Wales, and that the Government declined. I have not been able to ascertain the ground for the refusal, but at all events it is clear that our Australian Court could not deal with the root of the trouble.

Nevertheless, the operations required by the country at the wharves had ceased, and it became the duty of the Court to do anything in its power to get the operations resumed. Therefore on August 30, 1917, the Court, at the instance of some thirty employers, struck out of the award a clause which embarrassed them in making use of outside labour. The Prime

[1] Federated Railway Association, 4 C.L.R. 488.
[2] Coal and Shale Employees, 24 C.L.R. 85.

Minister, however, had been president of this union, and he evidently thought that something drastic should be done by way of punishment to the members. The public were alarmed and indignant at the widespread suspension of activities. The mode of punishment which the Prime Minister chose was the cancellation of the registration of the union in the registry of the Court. So he got the Governor-General to sign a regulation as under the War Precautions Act to enable him to cancel the registration of any union on strike if registered in the books of the Court. On the very day that the regulation was published, the Prime Minister caused an application to be made to the President for a rule *nisi* for the union to show cause before the Court why the registration should not be cancelled. This seemed to the President to mean, "You must cancel; for if you do not cancel I shall myself cancel." Such an attitude recalls the efforts of the Tudor and Stuart sovereigns to interfere with the judges in the execution of their duty, and especially the amusing controversy between James I. and Lord Coke in the evocation case; but the President granted the rule so that the matter might be discussed. It turned out on the argument that the Prime Minister thought by cancellation to destroy the award; but this was a mistake, for an award is not destroyed by cancellation of the registration of the union. The Court discharged the rule. The grounds were that the powers to cancel were not to be used as an instrument of fruitless vengeance; that the cancellation would not free the employers from the obligation of the award; that it would be unjust to members at ports at which there was no strike; that it would free the property of the union from

penalties for future strikes; that it would prevent the union from suing members for breach of its rules; that it would deprive the registrar of his power to get returns of members, officers, etc.; that it would make it difficult to know whom to summon to conferences. Moreover, the strike was against the advice of the executive union, and the union was now induced by the President to alter its rules so as to give to the executive more control over its members and branches, and so as to forbid strikes without the consent of the executive. Deregistration would not conduce to industrial peace, but would turn a public responsible body into an underground, irresponsible combination.[1] It is curious, indeed, to observe how, under the southern sky, the position has been reversed, and the registration of unions, which nearly led to a labour revolution in France in Waldeck Rousseau's time, about 1884, has become a desideratum of the union, is regarded by the unions as a privilege. The Prime Minister was very much displeased; but he did not attempt to make any further use of his supposed power under the regulation.

I have felt it necessary to state these three exceptions at some length. In the first case, to speak summarily, the trouble was mainly political. In the third case the Court had no jurisdiction—it was forbidden to touch the root of the trouble. But the second case was a clear case of strike for conditions of work which ought to have been submitted to the Court. It is satisfactory to find that in none of those cases was the strike owing to the failure, or alleged failure, of the Court to grant justice in any dispute as to which it had jurisdiction. It is significant also

[1] Waterside Workers, 11 C.A.R.

that the widespread strike of August 1917 was in a dispute which was outside the jurisdiction of this Court, and which was not submitted to the Court of the State in which the dispute occurred.

The Sympathetic Strike.

The occurrences of August 1917 have led to the consideration of the proper mode of dealing with the "sympathetic" strike. The difficulty is mainly a psychological difficulty—it might be called a moral difficulty. What is a man to do who wants to lead a peaceful life, but whose comrades refuse to work, in order to aid other unionists in their struggle with other employers? He wants to be true to unionism, and his comrades. He hates the idea of taking advantage of his comrades' self-denial, of taking a job that one of them might get but for making common cause with those who have an alleged grievance:

"The pathetic feature of the position is that most of the men think that by ceasing work in sympathy with the New South Wales railway men they are doing what is virtuous—sacrificing themselves for their fellows; or, putting the matter in another way, they are afraid of being charged with perfidy towards other unionists. If men in a union could be brought to see that their duty to the public, to their human kind, is higher than their duty to other unions (whether the other unions are right or wrong), the problem of sympathetic strikes would be nearly solved. If they could be brought to weigh the probabilities of advantage coming to the fighting union from the sympathetic strike against the certainty of general loss, unemployment, misery, this would also help to the solution of the problem."[1]

[1] Waterside Workers, August 30, 1917, 11 C.A.R.

Transport workers, especially, of all kinds, are always made to bear the brunt of the struggles of other unionists. The grievance is not the grievance of their union, and there is nothing for the Court to arbitrate about, no subject-matter in dispute between the sympathetic striker or his union and any employer. It may be said that an Arbitration Court cannot be expected to achieve the impossible, that it must stop short of a case in which there is no alleged industrial grievance as between the sympathetic striker and his employer, and that the Court ought not to attempt to take away the right of every man to put his hands in his pockets and to say, "I shall not accept the work offered—no matter what my reason may be." Individual freedom of action to work or not to work must be preserved at all costs; and yet it cannot be right that the community should be wilfully held up in its necessary activities when the community provides means for preventing the oppression of the poor for their poverty. It would be a great gain to the community if each union were to confine its efforts to its own grievances. In the case of the engine-drivers, a class of workers whose members are found in all sorts of undertakings, the Court intimated that an award for such a craft should be regarded as a special privilege entailing special obligations, and asked what the members would do, for instance, in a strike of miners—would they lower and raise the officials and any men remaining at work? The leaders of the union were reasonable, admitted that the members should do so, and gave the Court an undertaking to that effect. Then, in the case of the Merchant Service Guild, I found that the masters and officers of the vessels were required to contract

to do manual work if and when required. This was obviously meant to provide for the case of the seamen or others striking. The Guild objected to this clause, and the Court forbade the insertion thereof in any contract. The masters and officers were to carry out their own function whatever men of other unions did. In the case of the waterside workers just quoted, where so many members joined in a sympathetic strike in aid of the New South Wales railway employees (employees whom the Court had no jurisdiction to touch) the union consented to give a bond rendering the union liable to £50 for each time that any two or more members of the union in combination struck work or refused to accept work as a means of enforcing compliance with any demand made by them or in their behalf on any respondents bound by awards of the Court in favour of the union, or with any demand made by any other union on any employer or employers. It was gratifying to find that the leaders of the union accepted the position as a fair one—"that in conceding to members of the union safeguards of the kind now suggested the Court should require the members to forgo combination to enforce demands on the employers while preserving their individual independence—their full liberty individually to refuse or to take work offered. For the work of the country must be done, and so long as the law provides an appropriate remedy for any injustice the remedy of withholding labour in combination in such a way as to prevent necessary operations is intolerable."[1] I may add that the union so altered its rules as to make it practically a breach of loyalty to the union to strike or refuse work in combination without the consent

[1] Waterside Workers, June 28, 1918, 12 C.A.R.

of the central executive. The union applied to the Court to restore the privilege of preference in employment, a privilege which had been conceded to the union by voluntary agreement with the employers on representations made by the union that there would be no stoppage of operations; but in the meantime the employers had terminated the agreements in pursuance of the powers therein, and had succeeded in getting their work done by others under promises that these others would get preference in employment; and the Court refused to interfere. It did not grant preference to the so-called "loyalists;" but it declined to give preference to members of the union and thereby interfere with arrangements which were successful so far as achieving a result which the public needed so badly, especially under war conditions. The ships were being loaded and unloaded, and that was enough. In another case the Court dismissed the matter of the dispute, refused to arbitrate for a union whose members were involved in this sympathetic strike. The Court had cognizance of a dispute on the application of an association of iron-workers. Information having been received that the members—about 3,000—had struck work in New South Wales in sympathy with the New South Wales railwaymen, the President directed the case to be put in his list with liberty to any party to file affidavits. It appeared that the members, though engaged in manufacturing steel for rails and rifles required by the British and Australian and State Governments, had struck; and the Court dismissed the dispute under a clause of the Act empowering the Court to dismiss it if further proceedings are not desirable in the public interest (s. 38 [h]).

"This Court has repeatedly expressed the value which it attaches to unionism, and with no uncertain voice, but this Court cannot help unionism in a struggle against the public interest."[1]

It is hard to see what more could be done by the Court, a Court created by and for the public of Australia. It remains to be seen how far these methods will be successful. The only complete remedy is the adoption of a clearer and higher ideal of duty. The moral and psychological problem remains.

Improvements in the Law, etc.

I referred in the previous article to the applications previously made to the Court for Prohibition against the President for alleged excess of the constitutional powers. The application mostly turned on the meaning of the word "*dispute*," or the words "*extending beyond the limits of any one State;*" and the prohibition proceedings were extraordinarily long and costly. The Court of Conciliation might take weeks in investigating the merits of the case and in making an award, and then any one dissatisfied party might bring proceedings for prohibition on the ground that there was no "dispute," etc. The proceedings were generally unsuccessful, it is true, but the uncertainty as to being able to hold an award should they get it deterred many unions from approaching the Court for relief instead of stopping work. My American friends will be pleased to know that this obstacle to the usefulness of the Court is no longer formidable. In the first place the High Court has better defined the meaning of the words by certain decisions; and in the second place Parliament has amended the Act by

[1] Ironworkers, 11 C.A.R.

enabling a Justice of the High Court to decide whether there is a "dispute extending" or not, before arbitration, and his decision is final (Sec. 21AA). Now, when a dispute extending is not admitted an application is made to a Justice of the High Court for such a decision before the case is dealt with in the Court of Arbitration.

Another great addition to the usefulness of this Court has been made by a decision of the High Court to the effect that the Court of Conciliation has jurisdiction to "prevent" an industrial dispute extending by taking the quarrel in hand and even making an award as to it before it extends to other States.[1] For instance, there is a dispute at the port of Rockhampton. If it be not settled there the members of the union in the ports of other States will probably treat the vessels which come from Rockhampton as "black" and refuse to work them. The Court of Conciliation in such circumstances has on several occasions settled the dispute before it has extended.[2]

The utility of the power conferred on the President to call a compulsory conference of representative disputants has been time after time demonstrated. Frequently the conference has prevented a local strike which was imminent. Frequently, arrangements are made for carrying on work until award; frequently, quarrels are settled or agreements are made as the result of a conference. The power to call a conference is discretionary; and if in any locality members of the union have struck work the President refuses to call a conference unless work is resumed in

[1] Merchant Service Guild, 16 C.A.R. 591.
[2] Waterside Workers, 10 C.A.R. 429; Merchant Service Guild, 10 C.A.R. 214, 228.

the meantime on the old terms (that is to say, refuses to call a conference at the instance of the union). This refusal has on some occasions set the wheels of industry going again until the award has been made.

Since the previous article, employers more frequently than before seek the assistance of the Court for the settlement of disputes. They often ask for compulsory conferences. For instance, the fruitgrowers at the interesting settlements of Mildura and Renmark on the Murray River had, year after year, much trouble with the seasonal employees for picking, packing, etc. An award was made in 1912 at the instance of the Rural Workers' Union and another, and the work went on for the term of the award, three years, without any conflict. When the term expired the union had been disbanded, its members having joined the Australian Workers' Union. The employers wanted to get the same award as between themselves and the Australian Workers' Union, and the latter union was willing to accept the same award; but there was no dispute, and therefore the Court had no jurisdiction. Subsequently, in view of the increase in the cost of living, the Australian Workers' Union made a demand for higher wages, etc. This demand was disputed, and then the Court got jurisdiction. After a discussion in conference an agreement was made and filed, and the work went on smoothly.[1] This case, however, points to the inconvenience of limiting the jurisdiction of the Court to disputes. It may be that the same power that deals with the disputes should be enabled to regulate labour where necessary.

The President has frequently been asked to act in

[1] Fruitgrowers, 9 C.A.R. 288.

a one-State dispute as voluntary arbitrator on an ordinary submission by agreement. The request has generally to be refused, but in exceptional cases the Court has acted at the request of Ministers of a State or of the Commonwealth, especially where the matter affects the defence of the Commonwealth.

Another encouraging feature of the position is that the practice of arbitration, instead of the practice of strike, is favoured by all, or nearly all, the greater unions. Federal unions are frequently constituted with the avowed view of making common cause in the several States as to existing grievances, and of getting the Court to settle the dispute all round. The Australian Workers' Union—the greatest union in Australia, comprising about 70,000 members in pastoral, farming, and other rural occupations—is a staunch supporter of the work of the Court. Formerly there was continual trouble with the shearers, shed hands, wool pressers, etc. There was no certainty that the pastoralists could get their work done, and yet wool is probably the principal export of Australia. Since the constitution of this Court there has been no general strike of these men. There have been some local troubles, but the executive of the union brings all its influence to bear in favour of waiting for the Court. In 1911 the Court gave an award which did not increase the existing rate for shearing (24s. per hundred), and it actually reduced some rates for wool pressers; and, although in the succeeding years the cost of living increased to a formidable extent, the executive of the union insisted on the members taking employment under the award conditions until the Court should deal with an application for an advance. In 1917 the union came

before the Court for an advance to 30s. per hundred, and, with the consent of the employers who appeared, the Court prescribed that rate. The same union recently took under its wing the workers called "station hands"—boundary riders, bullock drivers, and generally useful employees on the huge pastoral properties. The conditions of these station hands had hitherto been wholly unregulated. The men were paid wages which were wholly inadequate for family life—some 20s., some 25s. per week or less. The Court granted them the basic wage, but allowed the employers to satisfy the wages in kind by allowances and perquisites (such as residence and provisions) to an amount not exceeding 30s. per week, provided that the value of the allowances and perquisites be approved by a board of reference or by a union official. I have found gratification expressed in unexpected quarters on account of this approach to the solution of a very difficult problem. One of the drawbacks of Australia is the want of population in the back country, the drift to the cities, to occupations which are regulated, and which provide opportunities for family life. On the whole, and although it involves great difficulty and much toil, I am safe in saying that this interesting Australian experiment is so far a success, and that there is not the slightest indication of any movement to revert to the old anarchic state. There are plenty of suggestions, however, for the improvement of the system.

There is a very real antinomy in the wages system between profits and humanity. The law of profits prescribes greater receipts and less expenditure—including expenditure on wages and on the protection of human life from deterioration. Humanity forbids

that reduction of expenditure should be obtained on such lines. Other things being equal, the more wages, the less profits: the less wages, the more profits. It is folly not to admit the fact and face it. Moreover, the economies which are the easiest to adopt in expenditure tend to waste and degradation of human life—the most valuable thing in the world; therefore, so long as the wage system continues there is need of some impartial regulating authority. Even if the wage system were to be abolished to-morrow, as some thinkers desire, if in some way the producers had an equal influence on the mode of producing, and equal opportunity for self-expression in the product, there would be need still for regulation. In proposition 30 of the previous article it is stated that "the Court refuses to dictate to employers what work they shall carry on, and how," etc. For "employers" substitute "elected directors of industry," and the proposition would remain sound. Even elected persons are sometimes found indifferent to the legitimate claims of a minority. Even unions have been found to disregard the just interests of craftsmen in their ranks, if the craftsmen are few in numbers. Those who favour new systems as the result of some cataclysm or catastrophe or revolution, and treat with scorn industrial tribunals as mere alleviations, or as mere devices to bolster up the existing system, had surely better reconsider their opposition. Let not the better be always the enemy of the good.

CHAPTER III.

An Article written to the *Harvard Law Review*, December, 1920.

Readers of the *Harvard Law Review* who have perused the two previous articles under this heading (November 1915, January 1919) may be interested in reading of the more recent developments of the Commonwealth Court of Conciliation and Arbitration in Australia.

There are three main aspects in which the results of such an experiment may be considered: (1) How far continuity of industrial operations is secured; (2) how far the conditions of the workers have been improved; and (3) how far the use of human life for industrial processes has been reduced to system and standardized. The first aspect appeals mainly to the employing class; the second to the employees; the third to those who study the development of law and order in human relations. All three aspects concern the whole community.

1. Never has there been such industrial unrest as at present throughout the world. Owing to causes which I need not stay to consider, the cost of living has risen everywhere during the Great War; and it is still rising. There is a shortage of commodities; the demand for labour has increased, and much exceeds the supply; the strategic position of the class who take employment is temporarily superior to that of the class who give employment. Vague and ill-

considered proposals for the immediate introduction of a new social order have been spread abroad, and in remote Australia as well as elsewhere. In the whirling confusion of the times, how far has this Court aided in securing the continuity of industrial operations? For the answer to this question, we are largely indebted to a rash speech made by a Federal Minister some twelve months ago. Possibly the speech was meant to prepare the public mind for the enunciation of some Government policy, not yet disclosed. The Minister quoted the Commonwealth Statistician as showing that there were 1,647 strikes in Australia during the years 1914-15-16-17; and he said that the hopes of the framers of the Federal Constitution, in inserting the provisions under which the Court has been created, have been disappointed. Of course, it is not the practice to treat police as useless because order is not always kept in the streets, or to treat criminal courts as useless because there are still crimes. But let the challenge be accepted as it stands. So far as can be traced, only three of these 1,647 strikes occurred in disputes that could possibly be entertained by this Court. It is not quite clear as to the third, but I give to the opponents of the Court the benefit of the doubt.

The Court is empowered to deal with such disputes as extend beyond the limits of any one State; and before the Court was created there were many strikes in such disputes. Even from 1904, when the Court was created, up to May, 1919, there were only three disputes at the most within its jurisdiction that were accompanied by a strike—partial or general. It is true that there was another, a very serious strike, in 1917, and that it extended, as a "sympathetic"

strike, beyond one State; but as the dispute was between engineers employed by the State Railways of New South Wales and the New South Wales Government, and as, under the accepted law, this Court could not touch the State railways, the dispute was outside its jurisdiction.

The greater the existing unrest, the more remarkable do these figures appear. In Article II., I have disclosed the circumstances of two out of the three strikes. Yet a Minister for Labour in Great Britain (Sir Robert Horne) said, a few months ago, that the Act is an admitted failure. I do not know where he got his information; perhaps from newspapers, perhaps from the speech of the above-mentioned Australian Minister. At all events, the eyes of the public have been opened by the publication of the figures, and the speech of the prophet has ended in a blessing instead of a curse.

But, apart from these telling figures, there have been, to my personal knowledge, many cases in which strikes would have occurred but for the influence of the Court. It is quite a common thing for the officers of a union to restrain their members from striking on the ground that the claims are to be brought before the Court, and that the Court will not deal with them if the members strike to obtain what they seek from the Court (as in the coal miners' strike mentioned in Article II.). For the Court refuses to exercise its powers (at the instance of the union) under the pressure of strike. There is then no guarantee of resumption of work unless the Court grant just what the union asks; and the Court refuses to act under such constraint. But of the number of strikes that have been averted through the influence of the Court

no record is kept. Since May, 1919, however, the number of strikes in disputes which the Court has power to handle has increased. There was, first, the Seamen's strike, May to August, 1919; then the Marine Engineers' strike; and now (July, 1920) the Gas strike. The facts of these strikes are worthy, each, of separate study.

I include the Seamen's strike, although it now appears from a decision of the Full High Court that the dispute as to wages and most of the conditions was not within the jurisdiction of the Court of Conciliation at all; for the parties were at the time under an award whose term had not expired. But, as the dispute was at the time believed to be and treated as being within the jurisdiction, I include this strike in my list. The men were excited by the exceptionally high rates granted in Great Britain and in the United States as a consequence of the war. Australian seamen had prided themselves on being the best paid in the world, and now found themselves left in the rear. They did not stay to consider that the cost of living had increased far more in Great Britain and in the United States than in Australia; according to the latest figures of the Statistician the increase in Great Britain since July, 1914, is 133 per cent.; in the United States, 96 per cent.; in Australia, 63·5 per cent. They did not stay to consider that the increase in rates was largely due to the risk from submarines. They did not stay to consider that the enormous increase in American rates was due to the efforts made to find competent men for the new merchant fleet of the United States. In Australia, the Government was, for the time, the principal shipping employer; for, under the exigencies of war, the Government had

purchased many ships, and had also taken over on charter, on a tonnage basis, nearly all of the Australian interstate ships and crews, but on the condition that any increases in wages should be borne by the Government. So the union approached the Government Controller in April, 1919, with demands for increased rates and other matters. The Controller refused to grant any concession, and the men left the ships. Then, and not till then, the Controller asked the President to call a conference. Having called it, I found that the men were directed by leaders who had come from other countries, and who were not familiar with or favourable to our Australian methods. One of the leaders, a man from Jersey, waxed indignant because the Court had not, in its previous award, granted provisions for better accommodation for the men, and was much perplexed when told that the Court could not have granted what had not been claimed. These leaders, coming from other parts of the world, believed in direct action—compulsion by strike; the Court was a mere capitalistic device, etc. The men were not to go back to the ships until they got what they wanted. The President refused to refer the matter into Court for consideration until the men returned to the ships, as the Court could not act freely under such conditions. The distress caused to the public by the stoppage of the ships can easily be imagined. The Government, it was said, must do something; so a Federal Minister held a private conference with the leaders, and, on the men returning to the ships, immediately announced that he had granted concessions. The concessions included the full increase in rates that the union sought. Each A.B. got £14 per month (in addition

to keep); each fireman £16. No reasons were given.

It is easy to purchase peace in this way—for a time. But in granting the concessions, the Minister did not provide for the other ratings in the ships—the officers, the marine engineers, the cooks, the stewards. He did not treat those who had not struck as well as those who had. The effect was soon apparent. The marine engineers struck. These are well-trained fitters who pass examinations in theory and in practice; and, having the control of the firemen in the stoke-hold, they have always been paid higher rates. But now the junior engineer found that the fireman who was under his orders got £16 per month, whereas he himself got only £15 10s. It so happened that the Full High Court had just decided that a union which is under an award whose term has not expired could get no relief from the Court of Conciliation; and the engineers were under such an award. They had no remedy but strike; and they struck. They imitated the seamen; and by strike the junior engineers were successful in getting from the Government £19 per month, instead of £15 10s. When the seamen returned to the ship, the stewards, etc., were also thrown out of work by the seamen's action, refused to sign the ship's articles again unless they got proportionate concessions; and they got them. The masters and officers also insisted on proportionate concessions, and they would have struck but for the Prime Minister promising, at the last hour, to give them (March, 1920). The charter-party was terminated by the Government in April; the ship-owners have now to carry on business as best they can; and the Court has to try to bring order into the chaos

created by the Government. For the other unions are quick to understand what really has happened.

In December, 1919, the members of the union employed by the Metropolitan Gas Company of Melbourne struck for higher wages. The dispute was not within the competence of the Court, for it did not extend to any other State; but after three or four days the Premier of the State, fearing that the city would be left in darkness, called the leaders to confer with him. The result of the conference was that the company granted increased rates, and proceeded to increase the price of gas. December was a summer month; and the union was emboldened to try the effect of a threat to strike in winter. Most of the poorer classes use gas for light, for heat, for cooking. In May last, the union presented a huge log of demands to the principal employers in several States, including demands for higher wages, for a limit of 40 hours' work per week, etc., etc.; but the union wanted certain immediate concessions as from the 30th April. There was fair reason for asking for immediate concessions, if we assume that the claims were fair; for it had been decided by the Full High Court that, under the Act, an award if made could not cover the full time to which the dispute related, but only the time subsequent to the award. The Gas companies of Melbourne and suburbs offered several concessions, including a higher basic rate all round, and (at my instance) higher secondary rates, and a weekly hiring instead of a daily hiring. But the union insisted on a still higher basic rate, and struck for it in Melbourne. The rate granted in December exceeded that to which the official statistics then pointed; and the rate offered in May exceeded it still further. Most of the

employers who are parties to the dispute in the other States are municipalities who supply gas to the residents; and any rates that wealthy companies may safely grant must react severely on the small municipal undertakings. The union held out, however, and tried to get a special "tribunal" created by the Premier of Victoria to decide whether the men should get all that is claimed for the meantime, and not only the greater part of it. Of course, the union would like a special tribunal which is to confine its attention to the difference between that which has been offered and that which is claimed. It would stand no risk of losing, and it might gain something more—even as a bee, taking all that it can get from one flower, passes on to the next. Such is the result of letting men cherish hopes of a supplementary tribunal, which, in order to get temporary relief for the public, is constrained to yield anything that will put an end to the strike—and thereby foments more strikes. The practice of creating, or purporting to create, special tribunals originated with the Federal Government in the coal case of 1916; and the gas union thought it could force the State Premier, as the Federal Prime Minister had been forced, to appoint such a tribunal. But fortunately the State Premier (Mr. Lawson) saw the folly of the course proposed (as well as the unconstitutionality), and firmly refused to comply with the union's request; and after about seven weeks of strike the men have just returned to work on practically the same terms as had been offered before the strike. Certainly, they have gained nothing that they could not have gained if they had never struck work at all. All the suffering which they inflicted on the public as well as on their own families has failed to produce

any favourable result. It has been a sad and bitter lesson, but it will aid the methods of reason as against the methods of force—of strike. The union wants now to have the whole dispute referred to the Court.

It is hardly necessary to point the morals to be derived from the facts of these strikes. An employer is unwise, as well as unjust, if, when yielding to strikers, he do not give as handsome concessions to those who have not struck. Due proportion must be maintained between the several ratings or classes in any one industry, and indeed between different industries. To purchase present relief from strike pressure by tampering with the balanced system of the legitimate tribunal invites further strikes. The more you yield to strikes, the more strikes there will be. It is not only illegal, it is an encouragement of strikes to create or purport to create a special tribunal to overrule the legitimate tribunal. "Nothing can be more injurious to the steady prosecution of the industries required by the public than to concede to a party dissatisfied with an award, a new tribunal specially appointed to override the award, or even to decide as to the propriety of the award."[1] An Executive Government, from its very nature, is the worst arbiter or intermediary that can be conceived in industrial disputes.

2. But how far have the conditions of the workers been improved by the Court?

There appeared in the London *Times* weekly of 5th March, 1920, a communication from a special correspondent in Australia. It said:

"There is much discontent, too, with the whole

[1] Waterside Workers' tribunal case, 1920—not yet reported.

arbitration system, which official labour roundly declares to be a failure."

The Registrar brought this statement under the notice of Mr. Grayndler, the General Secretary of the Australian Workers' Union, the largest union in Australia, the union which has been the backbone of the official labour movement, and Mr. Grayndler wrote:

"The statement in the London *Times* of 5th March, 1920, viz.—'that there is much discontent, too, with the whole arbitration system, which official labour roundly declares to be a failure'—is quite contrary to facts. There has not been any such declaration by official labour, and by far the majority of the unions of Australia favour arbitration.

"As General Secretary of the Australian Workers' Union, by far the largest union in Australia, comprising 102,000 members, I can say that my union is a strong supporter of the arbitration system. Whatever shortcomings or troubles that exist or arise are due to the limitation of the Act itself and not to the system. Many of the defects in the Act could be remedied by legislation, and if the defects were removed or the powers of the Court enlarged the system would prove a great gain to the nation as a whole.

"The unions which have favoured the arbitration system still continue to do so, and are strongly of opinion that it is infinitely better than the method of direct action, which, after all, very few of the unions have adopted.

"The results, however, obtained by the unions which have followed the arbitration system, during the last ten years, are far better than anything gained in Australia by direct action. . . ."

This statement is, at the least, explicit. The shearers in the wool industry formed the original nucleus of this union; they are piece-workers; and they have had their rates raised from 20s. or 18s. 6d. per 100 sheep in 1907 to 30s. per 100 in 1917; and the attendant shed hands, cooks, woolpressers, etc., have also gained proportionate increases. The conditions of living and working for these seasonal workers while on the sheep stations have been made far more worthy of civilized men. As for the per-

manent hands—the "station hands," who assist the pastoralists on the property throughout the year, their wages have been lifted from 20s. or 25s. with keep to 48s. with keep, and to 72s. per week without keep under the last award.[1] Family life on the station has been encouraged by the award; for if the employer provide a residence, etc., he is allowed to deduct the value from the wages. The value has to be fixed with the consent of the union or of a board of reference. I have trustworthy information showing that men of a much better class than heretofore apply for employment as station hands, as a consequence of the new conditions.

This union has under its shield also the fruit pickers and others who work in the orchards; the wheat lumpers; and all kinds of employees who work in the country; and their positions have been much improved by the Court.

But let us consider the advantages gained through the Court by the seamen, firemen, and other seafaring men—probably the most helpless, the worst treated of all workers. Being always on the move, always dispersed, they have not been so able to combine as others for the improvement of conditions. The A.B. seamen have had their rates raised by the Court from £7 per month in 1911, to £12 5s. per month in 1918—75 per cent., and the other ratings have been raised proportionately. The Court has applied to seamen, firemen, engineers, officers, the principle of the eight hours' day at sea and in port—a privilege never previously conceded to seamen, I understand, in any part of the world. Not only has the eight hours' day been granted, but the men get five days off per

[1] Shearers' case, II. C.A.R. 389.

month (to compensate for lost Sundays or holidays), either in their home port or other suitable port. For every such day not granted, the men get double rates. They also have gained, from the Court, annual leave of fourteen days per annum on full pay. The marine cooks and stewards have made similar gains through the Court, although their hours cannot be regulated on exactly the same lines.

It would be impossible, without a long and laborious analysis of the awards, to give any adequate summary of the benefits which the employees have obtained through the Court; but I may state a few more which occur to me. When the Court came to deal with stokers at furnaces, and with other men engaged in continuous processes, these men had to work seven days per week, year in, year out; now, they work only six days, under rotation schemes. Men working in retort houses now get a week's annual leave on full pay. In clothing factories and shops girls and women have had their hours reduced by the Court from 48 hours to 44 per week; and, for practical reasons, the men have to enjoy the same reduction. Females get the same minimum rates as men, when in competition with them.[1]

Workers are allowed to form such associations as they think fit.[2] Full craftsmen are protected from unfair competition with low paid machinists.[3] Weekly wages have been substituted for daily or hourly, whenever possible.[4] Workers have to be paid for all time of duty, whether the employer has

[1] Fruit case, 6 C.A.R. 61; 13 C.A.R. 171.
[2] Liquor case, 12 C.A.R. 654.
[3] Coopers, 12 C.A.R. 439.
[4] Glass Founders' case, 12 C.A.R. 486; Ship Dockers, 12 C.A.R. 623; Gas, 13 C.A.R. 454; Coopers, 12 C.A.R, 443.

work for them in all such time or not.[1] By a system of averaging their actual hours of employment casual workers get a full living wage; for "they also serve who only stand and wait."[2] The basic or living wage is computed and awarded on the principle that a normal man has a family and must earn sufficient to support it. Nor is the basic wage confined to the money necessary for the main requisites of life—food, shelter, clothing; it allows something "to come and go on." The wage is based on civilized conditions—"the normal needs of the average employee regarded as a human being, living in a civilized community." That wage, as originally granted in 1907, lifted the standard of living for the poor; and, in the recent troublous years, it has followed closely the increase in the cost of living. Nor is the gain slight that men can improve their working conditions without stopping work or threatening to stop it—without punishing themselves and their dependants, and the community.

3. Even employers are at last beginning to recognize the advantages derived from the existence of an impartial tribunal, such as the Court, so far as it reduces to system and order the conditions under which human life can be used for the purpose of industry. Recently, the Metropolitan Gas Company of Melbourne published a statement as to the value of minimum rates of wages being fixed by such an authority—a statement which would certainly not have been made when the gas employees first came before the Court, when the company did all it could to crush the infant union:

[1] Coopers, 12 C.A.R. 444.
[2] Waterside Workers, 13 C.A.R. 603; *Ibid.* 620.

"It must be apparent that employers generally, and the controllers of public utilities in particular, must have the guidance of some constituted authority to establish rules governing the fixation of the basic wage, and that once a principle is adopted it should be adhered to until some better method is found. . . . It has been claimed by the worker that the Arbitration Court is not an ideal tribunal; but it must be admitted that up to the present it has been of inestimable benefit to the employees."

Some directors of big undertakings, such as the Metropolitan Tramways Trust, have actually agreed to vary the rates from time to time, according to the system adopted by the Court. Frequently—more frequently than ever before, and as to other conditions as well as to wages—the union and the employers, after a study of the system adopted by the Court in analogous cases, make an agreement without any hearing, and the agreement is certified by the Court and filed, and thereby becomes an award. (Sec. 24.) It is also quite common now for the parties to ask the decision or guidance of the Court on a few main subjects in dispute, and then to agree as to all the other items—even hundreds of items—in the light of the Court's findings, anticipating the application of the Court's principles. For instance, in the Clothing case,[1] there were 485 employers respondents to the plaint. There were 1,065 claims as numbered (many more if the sub-divisions of the claims were reckoned), of which 987 related to piecework rates. The respondents who appeared concurred with the union in asking the Court to decide as to the basic rates for adult males and for adult female workers—as to the maximum hours of work,

[1] 13 C.A.R. 634.

as to the propriety of a distinction in the rates for "order" goods and for "chart order" goods, and as to two or three minor matters. The Court acted on the request, gave its decision, and the parties who appeared signed an agreement as to the other matters. Then the problem arose as to the respondents who had neither appeared nor signed. The Court treated the terms to which the signing respondents had consented as being fair terms for the other respondents also (in the absence of evidence to the contrary), and awarded to the same effect against the respondents who had not signed. A similar course was adopted in the case of the Liquor trade.[1] Again, as to the Pastoral industry, the Court had made an award in 1917, prescribing rates and conditions for the many hundreds of respondents cited by the Union. As it was pointed out that there were other pastoralists who had not been cited, the union undertook, at the instance of the President, to make similar claims as to these others. When this was done, the Court threw on the second set of respondents the burden of showing that what was fair for the first set would not be fair for themselves; and the second award was made to the same effect as the first.[2]

An instance of standardizing on a different class of subject is afforded in the case of the waterside workers.[3] In 1915 the Court fixed the limit of weight for bagged ore to be lifted by one man at 1 cwt.; for bagged cargo to be handled by one man at 200 lbs.; for cargo on a truck (one man) at 5 cwt.; but for a single package, 6 cwt.; for cargo on a trolly (two men) at 15 cwt. All parties now concur in

[1] 13 C.A.R. 43.
[2] Pastoralists' Anderson case, 13 C.A.R. 364.
[3] 9 C.A.R. 293; 13 C.A.R. 614, 622.

approving of the limitations as preventing much friction; when the matter came before the Court again in 1919, none of the parties asked for any change; and the limitations are accepted even where the award does not bind. It is also well worthy of notice that on State wages boards and other tribunals appeal is constantly made to the standards prescribed by the Commonwealth Court and to the reasoning of this Court as appearing in its series of reports.

Now it is quite true, as some workers say (according to the Metropolitan Gas Company's statement in the passage quoted above), that "the Arbitration Court is not an ideal tribunal." It could be made much better, more beneficial to all parties and to the public, if Parliament were to adopt the improvements which are recommended by experience. I mean to refer to some of them hereafter. But all who have experience in the control of industries will recognize the immense advantage it is to the working of the industries to have definite rules laid down by some constituted authority for guidance—not only as to the basic wage, as the Gas Company stated, but as to other matters—always provided that the authority does not interfere with the discretion of the management rashly or stupidly.

During these last few trying years Australia has found the advantage of having set standards as to employment in industry, of having a tribunal ready and willing to apply these standards, and of providing a means whereby employees can get justice without the cruel and self-punishing device of strike; for, though we have our troubles, we have been free from such widespread stoppages and disorders as have occurred in Great Britain and in America.

Minimum Rates.

As I have explained in the previous articles, the Court fixes the minimum rate by first finding what is called the "basic wage"—the reasonable living wage for an ordinary adult labourer—and then adding the "secondary wage"—the additional sum that in practice is paid to a man for the skill or other exceptional necessary qualifications of his class.

In finding the basic wage the Court uses a rough estimate which it made in an inquiry in 1907 as to "fair and reasonable remuneration;"[1] and the Court varies the 7s. per day, 42s. per week, as then estimated, in the ratio that the cost of living has increased since 1907. For instance, if it now takes 30s. to purchase as much as could be purchased in 1907 for 17s. 6d., the basic wage is found by this formula:

17s. 6d. : 30s. :: 7s. : 12s.

The latest figures for Australia, as a whole, seem to give 12s. 9d. per day, 76s. 6d. per week, nearly £200 per annum; but the trend of the cost of living is still upwards. Effect is given, as far as possible, to the differences in the cost of living in different localities.

The estimates of the Commonwealth Statistician as to the variations in the purchasing power of money are made on scientific lines; and although often attacked on both sides by men who keep their minds fixed on the variations of some specific commodities, such as clothing, they have always stood every test.

But there is no doubt that the rough estimate made by the Court in 1907 ought to be superseded or revised by a new investigation made after so many

[1] 2 C.A.R. 1.

years have elapsed as to the absolute present cost of living. I had hoped—and suggested—that the Government would see fit to commit the investigation to the Commonwealth Statistician and his staff, as they would handle the subject coldly and impartially, aided by their experience and facilities. But the Government has seen fit to entrust the ascertainment of a fit basic wage to a Commission consisting of some representatives of the employers, and some representatives of the employees, with a distinguished lawyer as Chairman. Such an inquiry, in such an atmosphere, must inevitably elicit evidence of a rambling kind on both sides; and representatives tend to become partisans. But we must hope for the best.

The basic wage is to be fixed on family lines, on the assumption that the male adult worker has to support himself, a wife, and three dependent children. This is in accordance with the assumption of the Court in 1907; and it is also in accordance with the United States Bureau of Labour and Statistics, December, 1919. Mr. Seebohm Rowntree, in England, in his thoughtful study of the subject, "The Human Needs of Labour," has worked on the same lines. He says, as to the families of all classes in the City of York, that "if we were to base minimum wages on the human needs of families with less than three children, 80 per cent. of the children of fathers receiving the bare minimum wage would for a shorter or longer period be inadequately provided for, and 72 per cent. of them would be in this condition for five years or more." He even recommends a scheme whereby the States should supplement the minimum in the case of larger families. The Deputy President, Powers, J. (now resigned), has made a recommendation

recently to the same effect.[1] But in determining the duty of the employer to his employee the Court does not compel a basic wage calculated on more than three dependent children.

It has been urged—and fairly—that if the workers are never to get an increase in wages unless the cost of living rises and in proportion to the increase in the cost, they never get an improvement in their real wages at all—wages as represented by the commodities purchasable therewith. Of course, it is in itself a great disadvantage that by the system of increasing the money wages in proportion to the increase in the cost of living, the standard of life is not lowered—is maintained throughout these critical years. The increase in wages made by the Court is far greater and steadier than could have been achieved by strikes. But the Court has done more. By a curious piece of good fortune, the standard of life was actually raised *at the beginning*, before the application of the Statistician's figures; and the raised standard—not the previous standard—has been upheld in the long series of awards. For the very first case that came before the present President was a special enquiry in which the President had to decide (for the purpose of an Excise Tariff Act) whether certain manufacturers were giving "fair and reasonable remuneration" to their employees; and he had to make up his mind what was fair and reasonable. His conclusion was that a wage of 7s. per day, 42s. per week, was the least wage that would be sufficient for wholesome living in Melbourne, and the manufacturers were not paying so much. The wage at the time for the labourer was 5s. or 6s. per day. I think

[1] Metalliferous mining, 13 C.A.R. 550, 559, 572.

that I am close to the mark when I say, even for men in regular work, the average wage was not more than 5s. 6d. per day, 33s. per week. This would mean that the standard was raised by over 27 per cent. in 1907; and this raised standard has been preserved in the succeeding awards, which prescribed increases proportionate to the increase in the cost of living.

The system is now, apparently, universally accepted as just and proper. It will amuse some of my readers to know that the Court was for some years the target for numerous attacks on the ground that the Court was itself the wicked cause of the increase in the cost of living. Worried housewives were diligently instructed by certain journals that the Court was to blame. They were also taught the "vicious circle" theory—the fallacy that an increase of wages is no real benefit to the worker—that (for instance) an increase in the wages of a worker in motor-car bodies involves an equivalent increase in the price of his bread and meat. But since it became generally known that the cost of living has risen in other countries as well as in Australia—indeed, much higher than in Australia—there seems to be silence at last on this subject of the wickedness of the Court.

Secondary Wage.

But the secondary wage—defined as above—has to be added to the wage suitable for the unskilled labourer. The Court holds that the inducement to acquire the extra skill of the artisan must be maintained. For the purpose of ascertaining the secondary wage, the Court looks to the margin allowed for the special calling in practice before regulation; and both

employers and employees willingly acquiesce in this system.

During the violent financial upheaval caused by the Great War, and because of the widespread uncertainty as to what would follow, the Court has not increased the secondary wage in proportion to the increased cost of living; it has merely maintained the same absolute margin.[1] True, the additional commodities to which the skilled worker is entitled have increased in price also; but they are not so absolutely essential as the commodities necessary for wholesome living. Now that the war has ended, the question arises whether this cautious and conservative course should still be followed; but as the subject is to be discussed at an early date I refrain from further comment.

Minimum Rates and Scarcity of Labour.

In fixing minimum rates, the Court refuses to prescribe such rates as a temporary scarcity of the class of artisans or others enables the men to secure. For instance, fully qualified coopers are scarce—for various reasons; and high-class breweries are willing to give coopers higher wages than the system adopted by the Court would justify as a minimum—that is to say, the basic rate with the addition of the appropriate secondary wage for training and skill. This seems to be a proper case for the play of the forces of demand and supply. If the rates due to a temporary scarcity were to be prescribed as the minimum rate, there would be unrest produced among the artisans of the same grade as to whom there is not such scar-

[1] Merchant Service Guild, 10 C.A.R. 214.

city; and, when normal times return, there would be complications also in the employment even of coopers.[1] As stated in the Waterside Workers' case,[2] a minimum rate "means the least rate which the employer shall be allowed to pay, on pain of a penalty, whatever the state of the market for labour, or the need of the employee for work, whatever his efficiency and whatever the circumstances—agreeable or disagreeable." This does not prevent the Court, however, from prescribing, or creating machinery for fixing, a lower rate for workers who are old or infirm—in obedience to s. 40 (1) (*b*) of the Act.

A similar problem arose in the case of seafaring men of various ratings. Owing to the risk from submarines, and other causes which I have already mentioned, the rates offered to these men in other countries were hugely enhanced; and the Australian seamen and firemen claimed in 1918 50 per cent. increase in their minimum rates. The Court refused to depart from its systematic standard for the minimum, but suggested the offer of a bonus under the exceptional circumstances:

"It may be that the Australian ship-owners may have to outbid America by the grant of bonuses or otherwise, in order to retain seafaring men now settled in Australia. It is obviously no more an offence for an Australian seaman to ship from non-Australian ports in order to get the benefit of the higher wages than it is an offence for a merchant to sell his goods in the highest market."[3]

But the suggestion was not heeded. The Government had many ships of its own, and had nearly all

[1] Coopers, 12 C.A.R. 427. [2] 13 C.A.R. 608.
[3] Seamen, 12 C.A.R. 756-757.

the interstate ships under charter. It did nothing, and allowed things to drift to the strike to which I have already referred.

Offensive, etc., Jobs.

Closely allied to this subject is the subject of attempts made by unions to get extra minimum rates prescribed on the ground of the job being dirty or offensive, or risky to life or health. I have dealt with this matter in both the previous articles, and I do not want to repeat myself. But the position taken by the Court is well illustrated by a recent case as to gas-works employees. Time and a half rates were claimed for "men demolishing retort benches in close proximity to hot retorts," for "coal trimmers in fiery bunkers," for boiler cleaners. Extra pay was asked also for men working in dust or fumes, for men cleaning acid tanks, for men working at a height of 20 feet (6d. more per day), of 40 feet (1s. more per day), of 100 feet (1s. 6d. more per day), and for men working over a permanent floor or staging less than 6 feet wide—whatever the other circumstances. The Court said:

"The risks involved may, of course, enter into a bargain for rates, but they are not to be considered in fixing minimum rates. Nor is it well, in the interests of the community, that employers should be encouraged to think that the Court sanctions the putting of human life in danger if certain extra rates be paid. Such rates encourage slovenly management, and indifference to the men's safety. It would be much better for the union to ask for some regulating conditions which would prevent or diminish the risks involved. If such regulating conditions are impractic-

able, it might be more appropriate to ask for a reduction of hours than for an increase of wages."[1]

It was shown that a Victorian Wages Board had prescribed a higher rate for men working at a temperature of 130° F. This had, at all events, the merit of definiteness—a merit which the union's claim had not. But it left the men working at 129° or 125° F. to the ordinary rate; it would tend to raise disturbing contrasts, and provoke unrest.

Excessive Men.

The Court refuses to grant claims made for an unnecessary number of men for a job, where the object of the claim is merely to reduce unemployment. For instance, the Waterside Workers claimed that there should be six truckers at every hatch, six men in the hold or on deck of every vessel, two stackers and two gangway men for each hatch. Admittedly, the object was to compel the owners to employ more men; but more men were not usually necessary—in some cases they could not even be used. The Court cannot solve the problem of unemployment in this way. It is not fitted to manage a business concern, and will not interfere with the discretion of the employer as to the speed at which he wants to get his work done.[2]

Weekly Hiring—Casual Employment.

The Court holds that hiring by the day is better than hiring by the hour; and that hiring by the week is better than hiring by the day—wherever practicable.[3] Weekly wages fit in better with considerations of

[1] Gas, 13 C.A.R. 455-456.
[2] Waterside Workers, 13 C.A.R. 614-615.
[3] Ship Dockers, 12 C.A.R. 628; Gas, 13 C.A.R. 454.

subsistence, and tend to greater steadiness in the prosecution of the work required by the community. Casual work, at hourly hiring, involves much waste of time and available human energy, and is injurious to the morale and physique of the workers. I have referred in both the previous articles to the case of the waterside workers, hired by the hour. These men, it is held, served the employer and the public, not only by actual work, but by waiting in readiness for the ships to come; and they must be provided with a living wage. To be more definite, the Court sets itself to find, as well as it can, the average receipts of the average man—the man of average competence, who takes work in this industry and in no other, who works or seeks work every day at the wharves. Having found that he averaged thirty hours per week, the Court prescribed 2s. 3d. per hour, which means 67s. 6d. per week, for thirty hours' actual work.[1]

This is as near as the Court can go to a weekly wage for this average man. There is as yet no sign of organization among the employers such as would give full time of work every day at weekly wages. The principal difficulty arises from the needs of over-sea ships, as there are long intervals between their visits to our ports.

Piecework *v.* Timework.

Some unions will not submit to piecework at any price; some insist on piecework. Some theorists fancy that piecework, with its higher rates for greater speed of output, is a solution for all labour difficulties; but they are mistaken. The matter was elaborately discussed in a dispute between the Amalgamated

[1] Waterside Workers, 13 C.A.R. 604, 606.

Society of Engineers and the Commonwealth Government.[1] The Prime Minister, being anxious to get ships built at the greatest speed in the exigencies of the war, insisted that every union concerned in his shipbuilding scheme should agree to submit to piecework if required, or be excluded from employment. This union refused to make such an agreement, and brought the dispute before the President. The Court held that the refusal was justified. The expert managers of the shipyards admitted that they did not want to put men of this occupation on piecework rates; they knew piecework to be inappropriate in such an occupation, where there is little or no repetition work, and the worker has to apply his mind afresh from job to job. On the other hand, the Court refused to interfere with piecework rates, refused to award timework in the place of piecework, in the case of coal lumpers. It will hardly be believed in other countries that mechanical appliances have not yet been substituted for human labour, in a port so important as Melbourne, for the dirty and monotonous carrying of coal in bags into and from ships.[2] In the case of wheat lumpers on piecework rates, it was prescribed that the receipts from piecework were not to be less than one and a quarter times as much as timework rates.[3] In the case of the coopers the union sought to prohibit piecework. It appeared that many of the members desired piecework for the easier operations; whereas in many breweries the employers preferred timework, as it meant greater care in the production of the casks. The Court

[1] 12 C.A.R. 386.
[2] Waterside Workers, 13 C.A.R. 615.
[3] Wheat, 13 C.A.R. 814.

adopted the device of committing to the appropriate board of reference the function of determining whether piecework should be allowed and for what operations and in what places, and what the rates should be.[1] This is one of the numerous cases in which it would be expedient for the Court to have power to create a shop committee for each undertaking.

Need for Power to Appoint Shop Committees, etc.

It is not possible, in an article of this kind, to state even a tithe of the problems which are presented to the Court, still less to state the solutions which have been reached. I can only refer those who may wish for more specific information to our annual reports. They will see, for instance, in the Gas case, 193 different classes of occupations to be dealt with, and 547 items in dispute—all to be considered. But I desire to say something on general subjects, such as shop committees, compulsion in arbitration, defects in the Act, special tribunals.

Frequently in disputes the union makes a claim which involves a dispute extending beyond one State, but which cannot be determined justly or fitly by imposing one common rule for all the undertakings concerned. For instance, in the Gas case[2] it was claimed that when retorts are charged by means of scoops or hand shovels the maximum number of retorts to be drawn or charged in a shift should be twelve. Now it is the clear duty of the Court to endeavour to secure, where there is an appropriate dispute on the subject, that human powers must not be overtaxed; but such a regulation as claimed cannot

[1] Coopers, 12 C.A.R. 443. [2] 13 C.A.R. 457.

be justly made by an Australian Court for all gas-works under all conditions. The work is trying at all times; but, though twelve may be a proper maximum in the case of old and defective retorts, it is not a proper maximum in all cases. If there is to be regulation of the number of retorts to be charged, if the discretion of the manager, *primâ facie* autocratic, is to be limited, the regulation should be made by some man or men having the particular work in sight for the time being. As to such a matter (not as to all matters) there is much force in the statement attributed to a Minister that the tribunal should be local; but he does not realize the limitation of the Constitution or of the Act; he does not see that under present circumstances there can be no system of local tribunals, except so far as the power to appoint a board of reference can be applied. In such a case as this, a power to appoint a shop committee would be most useful; but the Government does not ask Parliament to give the Court such a power. The Court has therefore been compelled to make such use as it can of its power to appoint a board of reference (s. 40A)—a power which is most unsatisfactory (as explained in Article II.), but which has been made use of where possible, long before the Whitley Report of 1917 was published in Great Britain. The employers in this case strongly opposed the conferring of such authority on a board of reference. Their main fear was, as expressed "lest the board should decide managerial matters that ought to be left to those responsible for the administration."

Now, this subject, the participation of employees in matters of management of an undertaking, is sure to be prominent in all coming years; and it needs

careful consideration in all aspects. Lord Leverhulme has dealt with it cautiously but sympathetically. Mr. John D. Rockefeller, junior, another great employer, has expressed himself as being in favour of the representation of employees in industries. Mr. Justice Sankey and the three independent Government nominees on the Coal Mines Commission in Great Britain—at a time when they were not prepared to recommend nationalization—said:

"We are prepared, however, to report now that it is in the interests of the country that the colliery worker shall in the future have an effective voice in the direction of the mine."

So the matter has been lifted out of mere abstract speculation; but employers in Australia do not seem to recognize the growth of the movement towards some share in the responsibilities of management. Mr. John Dewey, in the *New Republic* (May 5, 1920), seems to me to hit a point of vital danger when he says that the success in the movement for better wages strengthens "the power of wage-earners to make demands for a still larger share in material products without creating among them a feeling of responsibility for industry itself." They should share the responsibility for the continuity and success of the industry. They should have "freedom to participate in its (the industry's) planning and conduct." Let them be in a position to "exercise their minds in connection with their daily occupations." In my opinion, there can be no stable equilibrium in the present position—"Here is your work; there are your wages; it is not your business to discuss to what work you are to apply your powers." The position

which the Court takes up is indicated in the case of the Marine Engineers:

"I attach great importance to proper boards of reference for industries. They allow the discussion of grievances; they enable the employers to see the difficulties of employees, and employees to see the difficulties of employers; they supply to some extent the crying want of our modern industrial system—the absence of co-operation between the management and the employees. They often remove causes of friction before serious industrial trouble arises. Some day it will be a matter of amazement when men look back on our times, and see what a wealth of experience is rejected in the working of industries. Under the stress of war, in Great Britain, there are being developed industrial councils of all kinds, councils at which employees meet the management on equal terms for the discussion of the common problems of the industry; and these boards of reference should fulfil similar functions."[1]

Unfortunately, boards of reference do not completely "fill the bill." There is need of shop committees, as elsewhere suggested by the Court;[2] but there is no indication that the Government has even considered the suggestion.

The provision as to boards of reference has been also applied to problems arising in connection with waterside workers. These casuals, employed by the hour, naturally expect, under certain circumstances, to be offered higher rates than the minimum prescribed, as an inducement to undertake the work. For example, a vessel arrived with her hold steamy and offensive—the vessel having been submerged after a fire, and the cargo of linseed and jute having

[1] 12 C.A.R. 681. [2] 13 C.A.R. 681.

rotted. Another vessel arrived on which there had been virulent influenza. In each case there was need for speed in discharging, but delay occurs if there is to be haggling as to the wages. The Court has provided that men who proceed forthwith with the work, leaving the rates to be settled by the union official and the foreman, or, if they differ, by the board of reference, shall be paid the rates so settled. So far, the provision seems to work well. The work required by the country proceeds pending the decision.[1]

Compulsion in Arbitration.

From our Australian point of view, the objections so fiercely urged, in America and in Great Britain, to compulsory arbitration appear to be fanciful and irrelevant. Compulsion may be applied at either of two points—compulsion to submit to arbitration before strike, and compulsion to obey the award. I do not know how far compulsion goes in the Norwegian Act, or in the recent statute of Kansas; but, so far as I understand from a journalistic statement as to the effect of a Bill laid on the table of the French Chamber of Deputies, it is the former kind only of compulsion that is proposed to be applied in France, even in the case of gas and other public utilities. I may be wrong, as I have not seen the Bill. Under the Australian Act, both kinds of compulsion are applicable; and no voices, so far as I know, are now raised against either. Regulation by tribunals of some sort is accepted; it is welcomed especially by the unions—the great majority of the unions. In the next place, while it is quite true that

[1] Waterside Workers, 13 C.A.R. 610-621.

well-drawn collective agreements would be, as to most subjects, preferable to awards, it is generally impossible to get such agreements. Sometimes there are thousands of respondents, often hundreds; many put in no appearance and will make no agreement. Even among the respondents who do appear, there are many who will dissent from certain proposals. If the Court has no compulsory power at all, it must very often wait in vain for universal consent. There will either be no agreement at all, or the agreement must be on the lines dictated by the most obstinate. With compulsion in the background, the agreement will be on the lines which the reasonable employers favour. Under the Act, the first duty of the Court is to try to get agreement; and, only if and so far as it cannot get agreement, to award. The ideal of the Court is to get such a regulation as the parties ought to put in a collective agreement; and compulsion means merely that as to claims on which the parties cannot agree, or as to which some of the parties will not agree, the Court can make an award. Very often, the mere fact that the Court has a power of compulsion in reserve impels the parties to find a line of agreement; and reasonable employers are more willing to make concessions when they feel that their competitors are to be bound by the same terms. In the analogous matters of protecting workers from dangerous machinery, of providing compensation for accidents, of limiting the hours for children's work, there could have been no relief if the workers had to wait for universal agreement on the subject; and legislators have had to make such matters the subject of direct coercive enactment.

Moreover, as stated in Article II., the dread ex-

pressed by certain theorists that compulsion would end in "a servile State"—a State in which the workers would be compelled to work in return for certain guarantees as to conditions—is unfounded, so far as our experience goes. It has been established here that a worker is not compelled to take work, any more than an employer is compelled to give work. From the nature of the case, the compulsion of an award is nearly always exerted on the employers. For as the employers have had, until lately, by far the stronger economic position for bargaining, the employers do not (except very rarely) seek the protection of the Court. The employees seek it, and take good care not to claim protection against themselves.

Defects in the Act.

The experience of the Court during some fifteen years of existence shows that the Act under which it works is very defective. This fact is not surprising, for the experiment is novel. For instance, there is the defect to which I have already referred, that the Court cannot appoint shop committees or industrial councils. Even the power to create a board of reference is defective. The Court is empowered to create a board to deal with any "specified" matter which under the award may require to be dealt with; but it has been held by the Full High Court that the Court must "specify" each difficulty to be dealt with before it knows what difficulties will arise (see Article II.).

Another thing: the Court has no power to enforce its own awards. Parliament purported to confer this power; but, according to a decision of the Full High

Court, the provision is invalid because the President has not a life tenure of his office.[1] The enforcement of awards is held to be part of the judicial power of the Commonwealth; and it is held that, under Sections 71, 72 of the Constitution, no judge can exercise that power unless he has a life tenure. There is this curious result, that proceedings for enforcement come before police magistrates who have usually a tenure at the mere will of the Executive. When I say that the parties strongly desire that the Court of Conciliation should itself authoritatively enforce its own awards, I desire not to be understood as reflecting in the slightest way on the police magistrates. But I say that the more confidence the parties can feel as to the enforcement of awards (or agreements deemed to be awards), the more they will favour the settlement of their disputes by or through the Court, and the less will they heed those who incite to strikes. So strong is the preference for the Court, that the President is frequently asked by both sides to say what ought to be done when some difference arises, both sides agreeing to carry out his decision, whatever it may be.[2] Even where employers are not bound by the award, they sometimes ask the President's ruling with regard thereto. The State Wheat Board of New South Wales had just secured a decision from the Full High Court to the effect that the Court of Conciliation had no power to bind the Board, being a Government agency, as to its operations; but as the Board could not get waterside workers to offer themselves for work except under the conditions of the award, it asked the Court to decide

[1] Waterside Workers *v.* Alexander, 25 C.L.R. 434.
[2] *E.g.*, 13 C.A.R. 178, 194.

a doubtful point. The President decided it, in order to aid the Board.[1] The Court has publicly stated that this power to enforce should be given; but the Federal Government has not stirred.

Again: it has been held by the Full High Court that under Section 28 of the Act there can be no new dispute entertained by the Court of Conciliation during the specified period of an award on a subject which has been dealt with in that award—even though quite new circumstances have arisen, though the actual claims in respect of the subject are different, and though there are parties to the new dispute who were not parties to the old dispute. Even if, since the award was made, the cost of living should have unexpectedly increased by 100 per cent. and new claims made, the Court can give no relief; the employees must be left to the old way of seeking relief by strike.[2] Moreover, when the Court, after the expiration of an award, is in a position to make a new award, it cannot make the new award apply to the whole time of the actual dispute—*e.g.*, if increased rates be granted they must not apply to the time before the new award is actually made. Before this ruling was given, the Court was frequently able to get the men to offer for work, to continue the operations required by the country, by assuring them—generally with the consent of the employers—that the new rates would apply as from the beginning of the dispute. Such an assurance was a potent aid to continuity of operations; but it cannot now be given. The Deputy-President as well as the President has called public attention to the crying need for an

[1] Waterside Workers, 13 C.A.R. 176.
[2] Gas, 27 C.L.R. 72.

amendment of Section 28; and the Full High Court has strongly recommended the Government and Parliament to give attention to the subject. But all the appeals are unavailing.

Further: it is of the utmost importance that the expense incidental to proceedings before the Court should be reduced as far as possible. Those who favour "direct action," the weapon of strike, are continually pointing to the expense of seeking relief through the Court. The main item of expense is that of bringing witnesses from long distances, and of keeping them until they have given their evidence. Lawyers are usually the scapegoat when people complain of expense; but, inasmuch as in the hearing of a dispute lawyers cannot appear except by unanimous consent, lawyers' costs do not usually affect seriously the aggregate of expenditure. But much expense could be saved if a separate application to the High Court to decide as to jurisdiction were made unnecessary. In 1914 Parliament certainly did service to the objects of the Act by putting an end to the practice, previously so common, of parties fighting the union on the merits, and then, if dissatisfied, applying to the High Court for prohibition—usually on the ground that there was no "dispute extending beyond the limits of any one State." By a new section, Section 21AA, Parliament provided that the decision of a justice of the High Court, on an application separate from the arbitration, should be conclusive on the subject. But in place of allowing the President or Deputy-President—both of whom are justices of the High Court—to decide this point of jurisdiction when the case is called on for conciliation and arbitration, Parliament has required a separate

application. Not only are there costs of lawyers on this application, but the mere expense of serving every respondent with the summons is formidable. An application has to be made for leave to substitute service by letter instead of personal service; and each letter has to be sent by post and registered. Where there are, as often there are, hundreds or thousands of respondents, the expense is very substantial. The President has recommended an amendment of the Act, but nothing has been done.

Then the judicial staff of the Court should undoubtedly be increased. At present there is but one Deputy-President, and the two justices are unable to overtake the increasing work. Industrial disputes will not brook "the law's delay." Claims for industrial relief are so live and urgent in these times of unrest that they cannot be postponed as Lord Eldon would postpone a decision involving the application of the Rule in Shelley's case. It is encouraging to find the unions—and the employers—so eager for the Court's assistance; but the assistance often comes too slowly. In New South Wales the Industrial Court of the State has three judges. In Queensland there are two at least; yet this Court, which has all Australia within its jurisdiction, has only two—sometimes one. It may be doubtful whether the Act allows more than one deputy; if doubtful, the Act should be amended. The President has appealed for more assistance, but the appeal is apparently not heeded.

The few defects which I have mentioned are defects which could be cured by parliamentary action, and Parliament, on such a subject, has to be led by the Government. The Government, however, is either

unable to understand the need for amendment or is unwilling to aid the Court in its efforts for the public good. I can find no other possible explanation. But an alteration of the Constitution would be necessary if we are to put the regulation of industrial matters on a thoroughly satisfactory basis. At present the State Parliaments have control of the whole subject of labour, with the exception of disputes extending beyond one State. Employers are often harassed by having two sets of laws, State and Federal, as to labour; and in a big undertaking there are often a dozen or score of awards to be obeyed, each drawn up independently, not harmonized with the others. In the first session of the first Federal Parliament a resolution was unanimously passed in both Houses in favour of entrusting the Federal Parliament with the whole subject of labour; and, if I may judge the views of the Prime Minister from certain amendments of the Constitution which he submitted to the country, but which the country has rejected for political reasons, he sees clearly that this is the true goal. I feel free to say something on this subject because of an application which came before me officially under Section 20 in a recent case as to the pastoralist industry.[1] Disputes relating to shearers and shed hands have always been recognized as being peculiarly fitted for this Australian Court, and have been settled in this Court hitherto. The men move from north to south, from State to State, from pastoral station to station, as the season advances. The work throughout is substantially the same. The Queensland Industrial Court, however, has this year —in pursuance of its undoubted power—prescribed

[1] Pastoralists, 1920, not yet reported.

(amongst other things) forty-four hours per week as the maximum number of hours for Queensland stations. In 1917 the Australian Court did not see fit to depart from the Australian standard of forty-eight hours. It is easy to conceive the friction which this conflict of the awards creates. A shearer passing over the invisible line of boundary from Queensland into New South Wales will object to working forty-eight hours; and the shearers in New South Wales, Victoria, and South Australia will claim forty-four hours as in Queensland. According to the newspapers they are actually refusing to accept work except on the Queensland terms as to hours and other conditions. Obviously all the conditions of such labour should be subject to one final, co-ordinating Australian authority, such as would prevent invidious comparisons and unnecessary causes of discontent. In short, the conditions should be regulated on one system, though the system may allow suitable differences in detail.

This view is not at all inconsistent with the suggestion made by some Federal Ministers that there should be local tribunals for local disputes. But as the Constitution stands, the Federal Parliament cannot create such tribunals—the disputes would not extend beyond one State. It is quite true that for certain points of difference local tribunals are the best—especially for such points of difference as boards of reference or shop committees might well deal with as above stated. At the same time it has to be borne in mind that employees jealously watch any privileges which employees in other localities or other undertakings enjoy, and which they do not enjoy themselves; and it is clear that such other

local tribunals ought to be subject to Australian revision. This means co-ordination to be effected by the tribunal which is Australian in its scope. At present the unions are only too apt to treat the State and Federal Courts as competing shops, and they resort to the shop which is likely to grant them the most.

Special "Tribunals."

It is bad enough for the State and the Federal Parliaments to be simultaneously dealing with the same subject of labour conditions; but there is "confusion worse confounded" when a Government creates, or purports to create, novel special "tribunals." The first instance, I think, was that of the coal miners; the facts are set out in Article II., and I do not feel justified in repeating here the sad story. The community was deprived of the coal it wanted, and as the President refused to arbitrate unless the Prime Minister left him judicially free, the Prime Minister appointed a tribunal which granted the miners' claims without evidence and without argument. The consequences of this yielding to strike, under the veil of a "tribunal," have been, as I pointed out in Article II., disastrous; and the coal miners are now threatening a general strike unless further demands which they make be conceded.

Last year there was the seamen's strike, which I have already described. A Minister sat in private conference, and granted to the strikers all the wages they claimed, and other things. In its inception, this conference could not fairly be called a "tribunal"; for the Government was, as before stated, the

principal shipping employer in Australia; and an employer must always be free to confer with his employees or their union. But, as the Minister forced the other shipping employers to agree to the same terms as the Government accepted, the conference became in effect a tribunal. The grave consequences of granting the concessions claimed without granting equivalent concessions to the men of other ratings who had not struck have already been stated. When the marine engineers struck, in order to get as good concessions as the seamen had got, the Government then, and not till then, yielded along the whole line to nearly the full extent of the claims, but left it to a special tribunal, having an eminent soldier as chairman, to say how much of the balance of the claim should be granted. The tribunal sat, and the public have been informed that the members of the union are still discontented as they did not get all that they asked.

Then there was the case of the Waterside Workers' "tribunal." The Court had refused, in 1918, to restore to the members of the union a right to preference in employment, or to restore the old practice of engagement at the wharves.[1] The employers had granted this preference in 1911 by agreement, but had duly terminated it in 1917 in consequence of the members having struck work in sympathy with New South Wales State railway employees; and they also established bureaux for engagement, for the protection of the men who offered for work during the strike. The Court, finding that the work of the country was being done under the new arrangements, refused to interfere

[1] 12 C.A.R. 277.

with them. The Ministers appointed a gentleman under a royal commission to inquire into the bureau system in Melbourne. It turns out now that his report was unfavourable to the abolition of the system; but in the meantime, and without disclosing the report, the Ministers announced that the bureau system was to be abolished. There is no pretence that this abolition was effected with the consent of the other ship-owners. Then the Sydney members of the union pressed for a similar decision for Sydney; and the Prime Minister requested the ship-owners to nominate representatives to sit on a "tribunal" which he had decided to create "with a view to effecting a settlement of matters in dispute on similar lines to those adopted in the case of Melbourne wharf workers." Some of the ship-owners have objected, well knowing how such a tribunal, created *ad hoc*, would be likely to act; and the proposal for such a tribunal has, up to the present time, miscarried.

Next there is the Gas case, where the Melbourne gas employees struck work (as set out in the previous part of this article) in June, 1920. The Premier of Victoria was strongly pressed to create a special tribunal to decide as to the difference between what the Melbourne companies offered and what the union claimed; but he has evidently seen the danger of allowing such "tribunals," and has refused to tread the primrose way which gives present ease and manifold and greater troubles hereafter.

Apart from the unconstitutionality, the illegality, of such special tribunals (for the Crown, the Executive, has no power without an Act of Parliament to create novel tribunals), the practice of creating (or

purporting to create) them is most unwise, most disastrous in its effects on industry, and on continuity in industrial operations. A special tribunal is really a device whereby the Government tries to "save its face" when yielding to a strike. The tribunal is expected to grant the claims, just or unjust, so far as is necessary to induce the strikers to resume work. It secures present ease by encouraging further and far greater trouble. As a child who finds that the more he cries the more he gets his way, will cry the more, so with men who strike. When Parliament provides a fair and even sympathetic tribunal to consider grievances, the Government will not prevent but will actually induce stoppages, if it hold out the prospect of a second tribunal to supplement or supersede the decisions of the legitimate tribunal. If a Government wanted to destroy the system of conciliation and arbitration, and to encourage unions to adopt the course of seeking remedies by holding up the community, it could not do so more effectually than by this practice of special tribunals. The proper course is obviously to watch and correct any defects in the legitimate tribunal; to make access to it easy and speedy and cheap; to take away from the employees all inducement to strike, all excuse for striking; to satisfy public opinion that for every real grievance there is a remedy on lines of reason; and never to yield anything to force, to strike.

It is evident that some people do not yet realize the importance of this great experiment, or the responsibility which rests on those who administer the Act, and, I must add, on those who interfere with its administration. It may be worth while to con-

sider some figures. It appeared in the course of a case that in 1918 the interstate ships alone (apart from the overseas ships and State coastal ships) paid to waterside workers about one million pounds sterling. The rates were then increased from 1s. 9d. to 2s. 3d. per hour; so it may fairly be inferred that the increase of 6d. per hour would cost the interstate shipowners £285,714 per annum more at least. In another case, that of the pastoralists in 1917, some newspaper alleged that the increases in rates prescribed by the award involved the transfer of four million pounds per annum from the pastoralists to the employees. This statement was not verified; no person stands sponsor for it; but it was repeated as if gospel truth from newspaper to newspaper, from mouth to mouth. "How shocking that any Court should have such power!" But the greater the amounts involved, the greater the necessity for giving to the Court all the assistance that it needs. The truth is that the Court transfers more money and affects directly more human lives than all the ordinary Courts of Australia taken together.

* * * * *

Assuming it to be established that the Court has greatly aided in securing the continuity of industrial operations in these troublous and critical times, that it has produced great improvements in the conditions of the workers, and that it has largely reduced to system and standardized the use of human life for industrial processes, the question yet remains, has the work of the Court any permanency for good? At this point, many generous, public-spirited theorists part company. Some of them have come to the con-

clusion that the remedy for all our industrial troubles lies in some socialistic scheme in which the whole wage system is to be abolished. Now I am far from deprecating idealism. There is no aspiration, no prayer, so ennobling as "Thy kingdom come." But though we think we see our distant objective, though we look with longing for that which is great and complete, as there float to our eager senses the "murmurs and scents of the infinite sea," we cannot confine the course of human movement to the exact channel which we mark out for it. What is to be deprecated is the opposition of idealists to any channel towards the ocean that is not of their own selection. The water must and will take its own course. In industrial unrest, there is much more than mere wages. If the wage system could be abolished to-morrow, everywhere, if it were just and possible for the workers to get "the whole product of labour," there would still be need for regulation of the conditions under which human life—the most valuable thing in the world—is to be safeguarded from deterioration and degradation, is to get full opportunity for the full development of its powers. Where there are more wills than one, there must come collisions of will—and disputes; and even if the directors of industry were to be elected there still would be need for regulation. Regulation has come to stay.

Since I wrote this article,[1] the policy of the Government has been announced in Parliament. I have been left to the newspapers of July 30 for information as to the policy. It is proposed in the Bills (*inter alia*) to create special tribunals at the will of

[1] The article was completed towards the end of July, 1920.

the Government; and a Minister may even refer to a tribunal a question whether something that a union has failed to obtain from the Court should be granted:

> "O navis referent in mare te novi
> Fluctus . . .
> . . . . . .
> Nunc desiderium curaque non levis."

CHAPTER IV.

Subsequent Decisions.

Since Article III. was written, July, 1920, there have been several further principles established which may have a far-reaching effect. It must be borne in mind, however, that the principles are not legally binding on any deputy-president, or on any successor in the presidency, and that I alone am responsible.

Reduction of Hours.

In the case of the Australian Timber Workers' Union[1] the Court reduced the ordinary hours from forty-eight to forty-four per week. Extra payment has to be made for any overtime. Before coming to this conclusion, the Court adopted a course which is unusual, but clearly within its powers to "inform its mind in such manner as it thinks just." Feeling that it should not prescribe forty-four hours for this industry unless it saw its way to prescribe similar hours in many other similar industries, especially industries involving the tending of time-saving machines, the Court invited the federal council of employers, the chambers of manufactures, and the Trades Hall councils (of unions) to appear, and it allowed certain great undertakings and interests to be represented on their request. The Federal Government was also invited to appear as representing the general public; but it refused the invitation. The

[1] 14 C.A.R. 811.

evidence and arguments took a much longer time than all the rest of the 267 claims in the log; but the issue at stake was worthy of all the time expended. Judgment was given on this issue on November 12, 1920, in favour of the union. Substantially it means that the workers get a "clean" eight hours' day, with half-holiday on Saturdays. Hitherto they had to purchase the half-holiday by working an extra three-quarters of an hour on five days, and an extra quarter on Saturday; and this meant that they had to rise, breakfast, travel, and start work at the mill or shop (usually) at 7.30 a.m. in winter as well as in summer. It is impossible to set out here all the considerations which influenced the Court; they can be found in reports for the year 1920 (vol. xiv.).

But the Court refused to accept the argument for the union to the effect that hours should be lowered because thereby more men would have to be employed; it treated relief from the bane of unemployment on such a ground as illusory. At the same time, the fact that the employers might have to employ more men or to pay extra rates for overtime, was not a valid ground for refusing to reduce the hours if the reduction were otherwise just and expedient. The Court was much assisted by the recent scientific studies of Miss Goldmark, Dr. Vernon, and others as to fatigue and efficiency, and by the consideration that the workers' time and vitality should not be all consumed in their task of breadwinning. The same ordinary hours have since been applied in the case of the Amalgamated Society of Engineers,[1] and in other cases.

[1] Amalgamated Society of Engineers, 15 C.A.R.

Increase of Secondary Wage.

In the dispute between the Merchant Service Guild and shipowners in 1916, as well as in other cases during the war, the Court had, in fixing the minimum wages for skilled workers, added to the basic wage as increased by the increased cost of living the mere amount of the previous secondary wage for training and skill. That is to say, the basic wage was increased from £110 to £161, by reason of the decrease in the purchasing power of money; but the £40 per annum, which had been treated as the proper secondary wage of junior officers in 1907 and 1911, was merely added, without increase, to the basic wage (see Chapter III.).

But the Court then said:

"It may be urged that, in the absence of evidence to the contrary, the decrease in the value of the sovereign must be treated as applying to all the commodities required by a man in the position of an officer as well as to the commodities required for a family's support on a labourer's standard of living; and it is quite true that the pressure of social forces makes the extra expenditure for the officer almost as essential for him as the labourer's expenditure for the labourer. But the fact remains that it is not so absolutely essential; and in a time of violent disturbances in prices such as the present, in a time when war has combined with the drought of 1914-15 to produce the rather alarming figures for 1915 on which I have to act, I do not think it advisable, in framing an award for three or five years to come, to push matters to an extreme."[1]

The promise to be implied from this judgment was fulfilled in September, 1920; for the employers

[1] Merchant Service Guild, 10 C.A.R. 214, 226.

produced no evidence tending to show that the industry could not bear the increase:

"The war is over; and although we cannot be said to have reached the desired haven in all respects, it would not be fair to withhold from these trained men their proper secondary wage for ever. . . . The result is that if the accepted margin between the basic wage and the junior officer's wage is to be restored to the officer, his pay should not be, in round figures, £18 10s. per month. I mean, of course, the true wage as represented by the commodities which the money paid will purchase. . . . The proper margin must be restored if we are to keep up a succession of trained men for the merchant service, and if we are even to keep our men in Australia.[1]

The last words refer to the attractive terms offered in America in order to get qualified men for the new American merchant service, and in Britain in order to refill the British Service.

Machinists and Tradesmen.

The subject of the relation of machinists to tradesmen would merit a treatise for itself. In the recent case of the Amalgamated Society of Engineers,[2] it was raised in an acute, though not quite consistent, form. The Court was asked to prescribe the same rates for most kinds of the machine operatives as for full tradesmen such as fitters and turners; but a lower rate was claimed for such machinists as drillers, nut and bolt makers, etc. The Court put the position thus:

"In recent years, the work done by fitters and turners (in particular) has been greatly aided in out-

[1] Merchant Service Guild, 14 C.A.R.
[2] Engineers, 15 C.A.R.

put, in speed, and in finish by divers ingenious machines worked by "machinists"—"operatives"—men not having the full craftsman's training, but placed by the employer, as to pay and position, somewhere between the tradesman and the labourer. These machinists are largely collected from tradesmen's assistants, or from labourers, or from lads who go to the works straight from school. By confining their energies to some one particular machine, they attain exceptional speed. The employer gets a greater output, and yet the machinists are generally paid less than the fitter."

It was admitted by employers that work to be done with the machine was work which, but for the machines, would have to be done by the craftsman with the old tools—hammer, chisel, vice, etc.—that to be a good fitter or turner a man should be able to work almost all the appropriate machines; and that, if an employer had to pay the same rate to a machinist as to a fitter, he would employ a fitter, as there are contingencies in which a fitter's training is of use. Instances were given of lads put on to a drilling machine at the age of fifteen or sixteen, and being kept to drilling holes only—getting no other employment in engineering shops during all their working life than that of drilling—because they can give more speed than others at drilling. Capacity for speed is, in itself, a kind of skill. The Court took the view that to prescribe lower wages for the mere machinist was to put pressure on the employer to choose the man who gets the lower wages, was "loading the dice" against the craftsman, and that the best way to discourage the manufacture of imperfect tradesmen, to prevent slavery to the machine, to develop full manhood, was to prescribe the same minimum

rate for the machinist as for the full tradesman. The practice in the United States and (to some extent) in Great Britain supported this course. On this line of reasoning the fitter's wage was prescribed for planers, shapers, slotters, etc.

Weekly Hiring.

In the case of the timber workers[1] and in the subsequent case of the engineers[2] the Court, as requested by the unions, prescribed weekly wages. The practice, as to the engineers, had always been to pay for the hours of actual work only; so that if the man's work stopped for lack of material, or for a breakdown, or for illness, or for any other cause, his wages stopped. If he lost an hour's work—even five minutes' work in some cases—he lost his pay for the time. The Court had often expressed itself in favour of weekly wages, where practicable; and as the employment of engineers is regular, not casual, and fairly permanent, the case seemed to be eminently suitable for weekly wages.

"There is nothing that steady family men desire more than constant work and some certainty as to their income for a week or more ahead. . . . Under weekly wages the employee tends to identify himself with the particular undertaking, to feel interested in the concern; and it takes much more to induce him to throw up a job if it is constant. It is in the interest of the employers, as well as in the interest of employees, that the employment should not be casual, that a man should not feel himself to be a piece of flotsam or jetsam in the industry, that he should have a sense of homeship in the concern. Moreover the wages prescribed will be less."

[1] Timber Workers, 14 C.A.R. [2] Engineers, 15 C.A.R.

The Court's practice is to prescribe higher rates per hour or per day where the employment is casual or intermittent.

"The chief objection is, of course, that if the employees do not suffer the loss of an hour's pay for an hour's absence the inducement to be punctual and regular is taken away. Of course the employer will have power to discharge the employee on notice, or in the case of wilful misconduct to dismiss him forthwith, without paying him for the part of the week served; but in dismissing certain employees the employer may be rather punishing himself. For instance, roll-turners are essential for the steel works at Waratah; but they are very scarce, and they cannot be replaced by others. Mr. E., one of the union officials, assures me that the men would not take advantage of the weekly tenure by greater irregularity of attendance; that they would feel more bound in honour to attend, as the whole loss of the non-attendance would fall on the employer. I shall not, until the experiment be tried, treat this sentiment of honour as a thing to be scorned. Moreover the same official tells me that if absences are more frequent under the weekly wage than under the hourly he thinks that the Court would be justified in varying the award."[1]

The Court, in prescribing the weekly pay, allowed a deduction for absence without reasonable cause; and any difference of opinion between employer and employee as to reasonable cause has to be settled either by the written concurrence of the employer and the union official or by the board of reference.

[1] Engineers, 15 C.A.R.

Piecework.

I find in the *New Statesman* of April 23 last a curious statement, made from Australia, that the Court—or rather myself—"practically ignored the relation of wages to output." I do not know how the able writer of the article got such an impression, unless it be from the fact that in the shipbuilding case[1] I decided that the Government was wrong in excluding from employment the members of a union —the Amalgamated Society of Engineers—unless the union agreed to submit to piecework if required. The work to be done in that case was wholly unsuited for piecework rates. There was practically no repetition work; and the skilled managers of the shipbuilding scheme said they would not dream of putting the men on piecework. The facts are stated in Chapter III. On the other hand, I refused to interfere with piecework rates in the case of coal lumpers in Melbourne,[2] and I refused to prohibit piecework in the case of coopers.[3] This very year, in the general case of the engineers,[4] I refused a claim to prohibit absolutely piecework, premium, bonus, etc.; but in view of the intensely bitter feeling of the engineers against such systems—a feeling engendered by abuses in Britain—I prescribed that the piecework rates and conditions must be approved by the union or by the appropriate board of reference. Some of the men said they would consent to piecework, said they were willing to have piecework "if the men had some say"; and I gave them "a

[1] Shipbuilding Engineers, 12 C.A.R. 386.
[2] Waterside Workers, 13 C.A.R. 615.
[3] Coopers, 12 C.A.R. 443.
[4] 15 C.A.R.

say." It is only just. Otherwise the employer or his foreman states a price, and it is a case of "take it or leave it." As Mr. Sidney Webb has pointed out, the man has to bargain individually, without the protection of his union, and the bargain is not free and equal. The men have found that the greater their output the greater is the cutting of the rates for the same or similar operations thereafter. Some ghastly instances of such shortsighted parsimony were proved. The moral effect also has to be considered on men who, but for the greed and strain of piecework and its congeners, would be good comrades. One leading engineer has spoken of them as "the various systems that make honest men thieves and gluttons and enemies out of shop-mates." But in the making of articles, as distinguished from the repairing, the employers are in competition with other countries; and the more speed, the greater output, the less the price at which the employers can supply the public. Since the establishment of the steel works in the Newcastle district a number of ancillary industries have been started for various steel products. There is plenty of ironstone, and in the Newcastle district plenty of coal and flux. If the cost can be kept down it is quite possible that with up-to-date machinery and equipment (at present most Australian undertakings are defective in this respect), and with proper organization, the Newcastle district may become the main source of supply of engineering products for the countries around the Pacific and for South Africa. But the position which I had to face was largely psychological, and there was no hope of getting engineers to accept piecework even where it is necessary—say, in the making of

brass cocks or the fitting up of meters—unless the autocratic powers of the employers as to rates be put under reasonable restraint. There is no hope of piecework without such restraint.

Apprentices and Boy Labour.

The Court attaches more importance than ever to the need for full training to the full craft. It discountenances the deadly system of "improvers" which has been permitted in certain States—"improvers" who are kept on mere repetition work, who learn how to work at great speed one, or perhaps two, machines, and become unfitted for anything else. The country needs fully trained craftsmen, and the lads need to learn their job all round. There has been much abuse of boy labour. Impecunious parents have been tempted to sacrifice their boys' careers by higher wages offered to "improvers" (at the beginning) than to apprentices. But there is abuse even when lads are duly apprenticed if too many apprentices are allowed. The Court therefore, unwillingly in the engineers' case,[1] limited apprentices to one apprentice to three journeymen. One to three is the recommendation of the New South Wales Board of Trade Committee, and it is prescribed in the Queensland award for the Queensland railways. It gives a liberal allowance to provide a perpetual succession of competent tradesmen. But the proportion may be varied, as to any particular employer, with the consent of the union or of the board of reference. It remains to be seen whether this provision will be successful in giving the needed flexibility.

[1] 15 C.A.R.

The Court also granted a claim that apprentices get four hours per week in the employer's time for attendance at a technical school or (if no technical school) for work with an approved correspondence school. Certain of the more liberal employers already grant this privilege or more.

The Court has also granted the claim for journeymen's overtime rates to be paid to apprentices when they work overtime. It would have gladly forbidden overtime altogether for boys beyond eight hours in the day. It is easy to understand the injury done to growing lads by excessive hours of work. It has to be remembered that in addition to eight hours' work in the factory they have to attend the technical school also and to attend drills for compulsory training under the Defence Act. The New South Wales Parliament twenty years ago forbade overtime for lads, and several employers concurred in the view that the lads should not be called on to work at night at all; but the Court cannot award anything which is not within the ambit of the dispute. The union frankly said that the claim for journeymen's overtime rates was meant to prohibit all overtime for lads; and yet I find that space is given by a newspaper to some *unnamed* employer to complain of the Court's unwise action on the ground that "as a father" he knows that so much money is really not good for the lads! It does not seem to have occurred to him, as a father, that lads may suffer from excessive hours of work.

The Basic Wage.

In Chapter III. I referred to the fact that a "basic wage commission" had been appointed by the Federal Government. The need for an inquiry as to the present cost of living had been urged by the Deputy President, as well as by myself, in our judgment; and I had suggested that the function of ascertaining the cost, on alternative regimens stated by the Court for unskilled labourers and as for specified districts, should be committed to the Statistician, with all his experience and facilities and his cool, scientific, impartial attitude. But the Government saw fit to commit the work to representatives of employers and employees, chosen by itself, with a neutral chairman. Unfortunately, under the main question as put, the commission had to find, not a basic wage as hitherto well understood by the community, not the necessary wage for an unskilled labourer, but

"the actual cost of living at the present time, according to reasonable standards of comfort, including all matter comprised in the ordinary expenditure of a household, for a man and his wife and three children under fourteen years of age, and the several items and amounts which make up that cost."

It will be observed that under this form of words the vital matter on which the report would turn was the "reasonable standards of comfort"—reasonable in the opinion of the commission; and no distinction was to be made between what is reasonable for a porter and for a pattern-maker, for a messenger and for a millionaire. The report of the commission, November, 1920, was, as might have been expected,

a cost of living which was far in excess of the basic wage on which the Court had been acting, in accordance with the rough estimate of 1907. The report found £5 16s. 6d. per week (for Melbourne), but it did not recommend that such a basic wage should be enforced. That is to say, if the report were to be carried out in practice a man could not be employed even in sweeping a yard or in running on messages unless he were paid £5 16s. 6d. per week. For the commissioners, on carefully scanning the question put, naturally thought that it was not their duty "to discriminate between the standard reasonable for one type of employee and that which is reasonable for another type." The result of the report has been disastrous. The Commonwealth Statistician has reported that the whole produced wealth of the country, including profits, would not be sufficient to pay such a wage; and yet many of the unions have combined to press for the wage as if it were a true basic wage. In the case of the engineers[1] the Court did not hesitate in refusing to act on such finding, and it intimated its intention to act on its rough estimate of 1907 (as increased to meet the decreased purchasing power of money) and until a more satisfactory standard can be found.

But out of the general confusion which has followed the report there has emerged a suggestion which is worthy of consideration. Our basic wage, as is well known, includes provision for a man, wife, and "about three" dependent children, and it has to be paid to a man who is unmarried, or who is childless though married, or who has more than three dependent children. The object of this uni-

[1] 15 C.A.R.

formity is obvious; the employer, in choosing an employee, should not be driven to concern himself with the man's domestic affairs or tempted to choose men who have no children or few children in preference to men who have many. The course adopted by the Court seems to be the best practicable under existing circumstances, as marriage is one of the normal needs of a man in a civilized community. The basic wage should include some reasonable allowance for family life and children. It is not in the interest of society that the practice of advertising for men with "no encumbrances"—a practice not uncommon already—should become general. But if the State, or States, should see a way to provide for a subvention in aid of each child, whether the money is to come from the Treasury or from a tax on employers, the position would be greatly changed. I observe that Mr. Seebohm Rowntree, in his interesting book, "The Human Needs of Labour," has suggested for Britain a State grant for any children above three in number (pp. 141-143). The New South Wales Government has approved of a Motherhood Endowment Bill, under which parents would receive a payment of 6s. per week on account of each child in excess of two (for two children, not three, are taken into the computation of the basic wage by the New South Wales Board of Trade). In Australia there may be constitutional difficulties in the way of such a subvention from the Federal Treasury, and the States may not all concur in providing it. It may be urged with force that the burden of the provision should not be thrown on the employers by special taxation, as the country as a whole is interested, not the employers only, in the proper

maintenance of children and in the growth of population. The whole subject calls for careful consideration, and hardly falls within the scope of this work. I merely mention it because it is obvious that the basic wage payable by the employer may, with such a subvention, be reduced so as to cover the normal expenditure for the man, or for the man and his wife alone. In the meantime, until such a provision be made, the only course open to the Court seems to be to follow its existing practice, making the basic wage sufficient to cover a reasonable allowance for dependent children.

Standard Conditions.

In Chapter III. I referred to the fact that employers are beginning to recognize the advantages derived from the existence of an impartial tribunal, so far as it reduces to system and order the conditions under which human life can be used for the purposes of industry; and to the fact that certain great undertakings have agreed to vary the rates of wages from time to time according to the system adopted by the Court. I am happy to be able to state that such agreements are now very numerous. Sometimes the agreement is made in settlement of a dispute, without the aid of the Court; and such agreement, when filed, is deemed to be an award. But sometimes the agreement is made without reference to any specific dispute, so as to provide an automatic adjustment of wages on the basis of the Statistician's figures and of the Court's practice. Agreements are made even as to hours and conditions other than wages in the light of previous pronouncements of the Court. Moreover, when timework rates are settled by the Court, the

parties seem to be able to settle piecework rates, taking the timework wages as the basis. Even the limits of weights to be carried or handled, or moved on trucks, as prescribed by the Court in one industry, are generally accepted throughout Australia. Readers will understand now the importance which, in the articles, I have attached to the "standardizing of conditions." Often the plaint contains hundreds of complicated claims, with subdivisions, and the Court is asked to decide two or three points only which are fundamental. The parties agree to the rest, knowing from the decision in previous cases the principles on which the Court is likely to act. Settled standards are impossible under what is misnamed "freedom of contract," when the employer is "free" to give or not to give employment to the applicant, and the applicant is "free" to choose between unfair or even dangerous conditions and an empty larder; and when employers disposed to be liberal are forced to adopt the illiberal ways of competitors. We have already standards set by Parliament, or under its legislation, for ventilation, for safety from machinery, for sanitary arrangements. These standards are enforced whatever the effect on finances, on the profits of the undertaking or of the industry as a whole. Standards, if properly established, prevent much industrial friction, conduce to contentment, are an incalculable saving of time and energy. Even in the Court the discussions tend to diminish in length. Some persons, seeing only what the Court awards, have the notion that the Court's proceedings are confined to compulsory awards, resisted awards. The truth is that in consequence of the Court's settled standards there is now more of agreement than of compulsory order, more

of conciliation than of arbitration. It is due to an unfortunate ignorance, an ignorance arising from failure to study the Court's doings, that we sometimes find leader-writers speaking of the Court as putting employers and employees in hostile arrays. They are in hostile arrays already, Court or no Court; but the Court brings them together as round a table, and compels them, in each array, to consider each other's difficulties, and to deal with proposals on lines of reason rather than force, of right rather than might. Very often reasonable employers grant conditions such as they would willingly grant but that their rivals or competitors would not, without the influence of the Court, follow the same standards. But if the recent practice of creating special tribunals should continue—tribunals of emergency, of panic, created for the purpose of avoiding or terminating a stoppage of operations at any cost—tribunals not in any way co-ordinated with the permanent Court—the advantages of the definite standards will be lost or much diminished.

Effects on Industry.

But when wages are increased or conditions are imposed, they involve expense; and there is a limit to the expenditure which an industry can bear. The expenditure must be kept under the income, or the business will not be carried on for any long time. The practice of the Court has been to find what award would be fair on the assumption that the industry can stand it, and then to let the employers show, if they can, that the industry cannot stand it. By the "industry" I do not mean a particular undertaking; for the undertaking may be carried on with-

out proper equipment, or with slovenly organization. The Court is very chary of prescribing any wage lower than the proper basic wage; but "there is no such necessary rigidity about the secondary wage." In the case of the engineers,[1] as there are so many highly skilled workers, the secondary wage is a matter of much importance, but although the rates of pay as affected by the secondary wage were keenly contested, there was no evidence whatever submitted to the Court by the employers to establish that they should not be called upon to pay such secondary wages as should be found to be just. No evidence was tendered to show the Court any analysis of costs in relation to prices, of the effects of wages or the proposed increase of wages on the price that could be charged. It is well known that the ratio of the wages cost to the cost of material varies very much with different commodities. No evidence on this important subject was put before the Court by any respondent—if I except the irrelevant case of a copper-mining company which had already ceased production owing to the fall in the price of copper. Even when the advocate for the union, in cross-examination, asked an employer what charge he made for lathe work (turner's work), the employer indignantly objected to answer. Speaking, as he did, in the presence of competitors, there might be an objection on his part to disclose in public details of his business, and I therefore offered him an opportunity to give me the information in private (under Sec. 85); but he still objected, and I did not see fit to compel an answer. The only thing worthy of notice is that the employers did not seek to prove to the Court that

[1] Engineers, 15 C.A.R.

the industry could not pay the rates, and the fact was so stated in the judgment.

Notwithstanding these facts, a daily newspaper of wide circulation accepted from certain of the employers (mostly unnamed) statements to the effect that the award was closing up their undertakings, that they could not compete with imports from abroad, that they were compelled to discharge employees, etc. The public of Australia are more dependent on the daily press for information than the public of any other country in the world; and the public would not see the Court's judgment. Probably, thinking people would discount these statements as being one-sided, and would attach more value to the findings of the Court which had heard both sides; but all the people are not thinking. There should be no objection to criticism—even rough criticism—of what a Court may do or say. Personally, I take a strong view as to the transcendent importance of freedom of expression of opinion—the importance of toleration for opinions which we do not favour. From the nature of its business, the daily press of Australia is almost wholly on the side of the employing class; and it has frequently impugned the Court's action. But the frequent hostility of the press has rather helped the Court than hindered it in its influence on the other class. It is a delicate matter to speak about; but as I am now leaving the presidency of the Court, I feel free to say that for a newspaper to publish such statements as these without dates and particulars, without verification, without examining even what the Court has said on the subject, without (in most cases) insisting on the publication of the names of those who will

take the responsibility for the statement, is unfair to the public and injurious to its interests.

The writer of the article in the *New Statesman* to which I have already referred has fallen into an inaccuracy as to the attitude of the Court with respect to the effect of wages on the industry. He says that I "deliberately refused to consider in fixing wages the rates which the industry could bear." This statement is very nearly true as to the *basic* rate—the rate necessary for decent human subsistence, the living rate. But the Court at an early date—in 1909, in the Broken Hill case[1]—differentiated on this subject between the basic wage and the secondary wage:

"The remuneration of the employee cannot be allowed to depend on the profits made by his individual employer. This proposition does not mean that the possible profits or returns of the industry as a whole are never to be taken into account in settling the wages. So long as every employee gets a living wage, I can well understand that workmen of skill might consent to work in such a case for less than their proper wages, not only to get present employment, but in order to assist an enterprise which will afford them and their comrades more opportunities for employment hereafter. For this purpose, it is advisable to make the demarcation as clear and as definite as possible between that part of the wages which is for mere living, and that part of the wages which is due to skill, or to monopoly, or to other considerations. Unless great multitudes of people are to be irretrievably injured in themselves and in their families, unless society is to be perpetually in industrial unrest, it is necessary to keep this living wage as a thing sacrosanct, beyond the reach of

[1] 3 C.A.R.

bargaining. But where the skilled worker has secured a living wage, he has attained nearly to a contractual level with the employer, and, with caution, bargaining may be allowed to operate."

To get a reduction of the secondary wage, however, the employers must condescend to give specific evidence, detailed evidence; generalities and vague phrases will not avail. The evidence can be withheld from all but the Court, if so desired.

CHAPTER V.

The Future of Industrial Tribunals.

The article in the *New Statesman* to which I have already referred says, speaking of this Court:

"Wage regulation as an experiment has been well justified. It has been shown that wages can be raised by artificial action. But certain reactions and difficulties have arisen which, though difficult to cope with, should not be beyond the power of wise and reasonable statesmanship. It is this quality that has been lacking."

To my mind, these words state the position correctly in substance. We hear no more, of course, of the "wage fund," or that what one worker gains must be taken from another worker. We hear little now of the "inexorable laws of demand and supply," which used to be treated as more inexorable even than gravitation, less capable of counteraction even than gravitation. Minimum wage laws of a kind are to be found now in most civilized countries. It used to be said dogmatically that tribunals for industrial disputes were absurd and impracticable, because there would be no principles to guide the tribunals. A Court of Law has to obey Acts of Parliament or the Common Law, but what principle was an industrial tribunal to obey? The employer is as much within his rights in offering 10s. per day as the employee is within his rights in refusing to take employment for less than 12s.

Well, the experiment has been tried, and principles and standards have been evolved with the general approval of a nation which calls for production, but production with proper treatment of the producers; and the principles and standards have stood many a test, have in the main become embedded firmly in the nation's life and activities. From the nature of the case, the awards—or collective agreements made under the influence of the Court—operate more as a restraint on employers than on employees. It is the workers who usually take the initiative, seeking what they assert to be right as against might. The contract of employment, if not regulated, is dictated by the stronger party—usually the employer. The result is that employees press more and more into the Court, form more and more federated unions, with the object of getting the Court's assistance. Some of the documents set out in the Appendix show the great value which the unions generally attach to the Court. The number of federal logs of claims increases year after year, and the annual volume of reports of cases becomes bulkier. There are only two unions that, so far as I know, disclaim the assistance of the Court—the coal miners and the seamen; these unions, seemingly, prefer to squeeze the Government and the country rather than to rest on the justice of their claims. In Chapter II. I have given the history of the strike of the coal-miners, and in Chapter III. the history of the strike of the seamen, and I do not want to repeat myself.

The reasons which influenced the Whitley Com-

[1] The seamen, however, have recently, in two distinct proceedings, appealed to the Court for its assistance.

mittee in England to report against the adoption of compulsory arbitration are inapplicable to the compulsory arbitration of the Australian Court. "There is no reason," the Report says, "to believe that such a system is generally desired by employers and employed, and in the absence of such general acceptance it is obvious that its imposition would lead to unrest. The experience of compulsory arbitration during the War has shown that it is not a successful method of avoiding strikes, and in normal times it would undoubtedly prove even less successful." But in Australia many strikes and stoppages have admittedly been averted owing to the fact of the existence of this Court as well as of State Courts, and because the employees felt that they had some hope of redress, in times of rising prices, through the Court's machinery. Actual experiment has shown to the Australian workers that the Court is not a "Capitalistic device," and that it does not act so as to compel the workers to accept work at the minimum rates prescribed. It does not conduce to a "servile State."

I do not deny that Australian unions, or, at least, individual members thereof, are influenced in the unrest of these abnormal times by the theories which are afloat everywhere as to a completely new social order. "The abolition of the wage system" often appears as one of the objectives in union rules, and the right of the workers to "the whole product of the industry" is frequently asserted. We hear much of Marx and his principles, as expressed by conflicting schools of Marxians, and various socialistic or communistic schemes are favoured. It is evident also that the action (alleged and believed) of the

Allied Governments in giving assistance to counter-revolutionaries in Russia, in blockading Russia, and in preventing news from coming from Russia, has had a very bad effect here as elsewhere. But whatever theories the workers may favour for the ultimate solution of the industrial riddle, they know that in the meantime men and families must be fed and clothed and housed, and that the Court offers the best means available for securing redress for grievances. They know full well that they never could gain by strikes or by purely voluntary agreement—agreements made without compulsory arbitral power at the back—nearly so many concessions as they secure by means of peaceful discussion before the Court.

"Socialism in our time." Perhaps so; but which brand of socialism? The morrow's breakfast is of more immediate concern than the millennium. Where there is a prospect, as in Australia, of obtaining relief without losing one's job and its pay, the rank and file of the union, as well as the union's responsible leaders, have a solid argument for use in the union meetings against strikes; and the women of the homes reinforce the argument with the appeal, "Try the Courts first." People talk of the psychology of the worker, but the central fact affecting the psychology is to be found in Browning's lines:

> "Such eyes I saw that craved the light alone,
> Such mouths that wanted bread and nothing else,
> Such hands that supplicated handiwork.
> Men with the wives, and women with the babes,
> Yet all these pleading just to live, not die."

We cannot forecast the future. I do not presume to advocate any of the modern industrial theories put forward by many earnest, clever, suggestive

writers in these days; nor do I propound any distinctive theory of my own as a cure-all. I am fully aware that any interest which may attach to this little work will be due to the fact that it deals with actual experiences of the writer, acquired in the course of discharging official responsibilities, and not to any theories which he may have personally formed as to society. Such theories had better be left for a treatise of a different character. But may I be forgiven for saying that the great social changes of the world—I do not refer to political changes, but to changes which go to the root of custom, of habit, of everyday relations—have never, so far as I know, taken place in pursuance of any Utopian theory applied in practice. As Marx himself has said: "Man makes his own history, but he does not make it out of whole cloth; he does not make it out of conditions chosen by himself, but out of such as he finds close at hand. The traditions of all past generations weigh like an Alp on the brain of the living."[1] Abuses are painfully removed or reformed in detail; and when the old arrangements do not fit the new conditions they are eliminated as a foreign body from the flesh (as it were) of society, but slowly and with inflammation. That which has become useless to society, unreal in its new conditions, passes away, but very gradually. As with slavery, as with feudalism, so probably with modern industrialism. The very fact of universal industrial unrest seems to show that the industrial conditions have ceased to fit mankind. As slavery passed into serfdom, the rights of the lord becoming limited by law or custom; as serfdom

[1] "Eighteenth Brumaire," p. 9. I quote from Mr. Portus's "Marx and Modern Thought."

passed into the contractual relation, where the contract is practically dictated by the employer, who has the tools and the capital; so the contract of employment is being gradually regulated by or under the State in the interest of the community. It may be the function of our times to fix the regulations governing the use of human life in industry. Idealists may see in our age the mission of John the Baptist: "Prepare ye the way of the Lord, make His paths straight." Who knows but that some day workers may not employ capital, instead of capitalists employing the workers; or that Mr. Webb's idea of a social Parliament in addition to a political Parliament may not be carried out? But in the meantime, even as the extension of the King's peace over the land led to the suppression of private wars among the barons and great men of feudal times, so the extension of the nation's power to industrial conflicts will suppress, we may hope, the private wars between great employers and great unions. The King's writ must run within the factory as well as without, and as to any injurious treatment of the King's subjects engaged in industry. Just as employers have to obey regulations prescribing a minimum of safety, a minimum of ventilation, a minimum of sanitary arrangements, and whether the regulations interfere with profits or not, so they will have to obey laws which prescribe a minimum of sustenance for the human lives under their control, and a maximum of hours and fair conditions.

But how is the minimum of sustenance to be settled? It cannot be settled either by the party who uses the labour or by the party who labours; nor can it be settled by both, as both may combine

(as they have sometimes combined) against the consuming public. It must be settled by or under a neutral authority. It seems that whatever scheme of social polity we may favour, we are compelled to ascertain the proper remuneration. Even guild socialists, such as Mr. G. D. H. Cole, who favour the abolition of "wagery," and the substitution of guilds of producers of given commodities, have to come back to the problem, What is proper remuneration? When it is pointed out that such a guild, with its monopoly, could exploit the consumers, could raise the price of the commodity at its will, the answer of Mr. Cole is that anything demanded by the guild over and above what is necessary to pay a proper remuneration to its members should be taken in taxation for the benefit of the whole community. To ascertain what is proper remuneration for each worker, or each kind of worker, there must be some machinery organized; and those who work the machinery must be independent of both sides:

> "Neither beg nor fear
> Their favour nor their hate."

Inasmuch as I am now relieved of the responsibility for the further doings of the Commonwealth Court, I feel that I may now speak more freely than as President; and the public of Australia are entitled to know my opinions and to attribute such value to them as they think fit. I should like it to be distinctly understood that my resignation is not in any way due to any lack of faith in the utility of the Court to the public. I say deliberately, and after much thought, that, in my opinion, the system of conciliation and arbitration under the Commonwealth Act is, in essence, sound and beneficial to the com-

munity; and that with proper amendments (including amendments of the Constitution), and if the Government and Parliament act with common sense, it can be made to yield even richer results. Where two great bodies of men differ and will not yield one to the other, and yet do not want to resort to force, there is no device that I know better than that of the impartial arbitrator. This the Commonwealth Act gives.

It is true that the responsibility placed on the President or Deputy President is very great—greater as to amounts of money involved, and greater in direct effects on human lives, than that of all the ordinary civil Courts. It is true that he is empowered to dictate terms of employment compulsorily—practically, to compel the parties to make a collective agreement—if he cannot, under his power of conciliation, secure a voluntary agreement. It is true that he is necessarily unfamiliar with the several industries with which he has to deal, and there has been much talk in certain quarters to the effect that men engaged in an industry know better than any man not engaged in it the "intricacies" of the industry, the "details" of the industry. This talk overlooks the fact (1) that there is no arbitration, no dictation from an outsider under the Act, unless the parties to the dispute fail to agree; (2) that if nothing can be done without voluntary agreement the party having the stronger strategic position at the time always carries his way, dictates the terms to the other. But there is a third fact also—that these disputes do not relate to the "intricacies" or "details" of the industry at all. The disputes turn on the proper limitation to the use of human life—the use of the most valuable asset of the

nation, the treatment in industry of the object of all public activities—man; and for the determination of the proper limitations one who is outside the industry is as competent as one who is inside. With the view of meeting any case in which the dispute might involve technical knowledge Sec. 35 of the Act was enacted. It *compels* the Court to appoint assessors "for the purpose of advising it in relation to the dispute," if any one of the numerous parties to the dispute so desire; but it is significant that never in the long history of the Court until November or December, 1920—after my announcement of intention to resign—has there been any application for assessors. No doubt the parties felt that assessors would be futile. According to the Section, they would have to be chosen, one from the class of employers, one from the class of employees; and from the nature of the position they would become hot partisans. The President would have to decide ultimately, but after a greater expenditure of time and labour than if he sat alone. The issues of wages, hours, and other conditions are not dependent on craft knowledge. There are no disputes as to the methods used in moulding, or as to the manner of riveting. Sometimes, indeed, the Court has been called on to decide such a question as the number of retorts that a stoker should be called on to charge and discharge in his shift; but the Court has refused to lay down any rule on the subject applicable to all the undertakings. It has, however, committed the function to experts, to the boards of reference, who will have regard to the particular undertakings and the nature of the plant and appliances. The Court adheres to propositions 30 to 33 as stated in Chapter I. (p. 13): "The Court

leaves every employer free to carry on the business on his own system . . . free to put the utmost pressure on anything and everything except human life."

Under the circumstances, the experiment of industrial tribunals is not likely to be abandoned. The fact that until near the close of 1916 there was not any general strike or stoppage of work in aid of any dispute with which the Court was competent to deal; the fact that the strike of 1916 was the strike of the coal miners—essentially a political strike, because the Government was urging conscription for the war; the fact that the seamen's strike of 1919 was due to the revolutionary dogmas of a few non-Australian leaders, and that the other seafaring strikes were due to the mishandling of the seamen's strike by the Government; the fact that nearly all the unions crave the assistance of the Court, and urge the extension of its powers; the fact that standards have been created and principles established on which the industries needed by the community are carried on without stoppages; the fact that no industry (so far as is known) has ceased because of any award; the fact that none of the three parties in the Commonwealth puts forward in its programme the abolition of arbitration; the fact that the Court is more than ever in request after the fiery ordeal of war, and notwithstanding the world unrest in industrial matters —these facts point to the conclusion that the Court is meeting a real public need, and will continue. It matters little that presidents pass—and perhaps governments, perhaps parliaments; so far as Australia is concerned, and notwithstanding all the defects of the Act and of the Constitution—and of presidents—

the people cling to the system of industrial tribunals. It is necessary, however, as intimated in Chapter III., that the State tribunals be co-ordinated with the Commonwealth tribunals. We cannot leave the State and the Commonwealth dealing with the same subject independently at the same time. It would be well, in my opinion, to amend the Constitution by committing to the Commonwealth Parliament the whole subject of industrial relations, and to let that Parliament organize a co-ordinated system of tribunals local and general. It is a grievous wrong to those who have the responsibility of carrying on business undertakings that they should have to obey at the same time, on the same subject, two distinct authorities, State and Federal. If there is to be regulation (and there must be) it should come from one authority.

What, after all, is the goal of all efforts with regard to industries? It is surely to get ample production, the best product, and the best producers; the other matters are non-essential. The product must be the best in quality as well as ample in quantity; the producers must be best in spirit as well as best in body, but there cannot be improvement in spirit without ample sustenance for the body, and freedom from carking anxieties as to livelihood. The community wants for its industries workers who find satisfaction for their human nature in their work; and they cannot find this if they are merely irresponsible wage-earners. At present the workers feel no responsibility for the success of the industry; they take all they can get, and have no concern as to the results. They do not generally find self-expression in their work or any joy of creation. One class is astrain for profit-making, to keep down expenses,

including wages and expenditure for the wage-earners' benefit; the other class is astrain for demands which increase the expenses, and yet feels no responsibility for the industry itself. In this sense there is a real class war and a real danger. How is interest in the work, responsibility for the result, to be fostered? It is a psychological problem, and I see no answer to it but to give the workers "a say" as to what they produce and how they produce. Unless I mistake, it was Ireton who, at the constitutional discussion in Cromwell's time, said that if the right to vote be given to all, the right to bread must follow. Perhaps it is not too much to say that the right to vote on national subjects must be followed by some right to vote on industrial subjects —subjects which are even more intimately connected with daily life. Industrial subjects cannot be permanently excluded from the purview of free men engaged in the industry. The industry cannot be carried on without capital (I do not say capitalists, but capital); nor can it be carried on without labour. The capitalist has his capital at stake; the employee has his life at stake. I do not mean by his life merely his food, clothing, shelter; I include the whole mass of his life's powers and activities. As artists select their subjects and the mode of treating their subjects, and passionately repudiate dictation, so do workmen in their own degree. Often sidelights are thrown by witnesses during the Court discussions, sidelights which are all the more valuable as coming from minds concentrated on some other subject, some definite claim; and I am satisfied that much of the discontent of workers arises from being treated as cogs in a huge machine, and that there would be far

more interest taken in the work and the results, and even valuable suggestions made for improvement, if the workers were taken into council. Even under existing conditions, men show delight in, affection for a good tool or machine, though it does not add one penny to their earnings. I have, therefore, again and again, before and during and since the war, called attention in my judgments and articles to the importance of bringing the workmen and the management together to discuss methods and results; and I have made all the use that was possible to this end of the power conferred by Sect. 40 to create "boards of reference"; but such boards are not sufficient. They have to be confined to matters arising *under the award.* What is wanted is a shop committee (in the first instance) which can discuss any matter that may arise *in the industry* or the undertaking. Our Constitution and our Act do not allow such committees; and I see nothing for it but to commit to the Federal Parliament, by amendment of the Constitution, the complete power over all industrial matters. This course would enable the Parliament, if and when it sees fit, to limit any undue autocracy of those who supply the capital.

It may even be suggested, indeed, that there is no valid ground in the nature of things why those who supply the capital should have the sole direction of industry. Their objective is profits; and for the sake of profits they often limit production, turn out inferior and tasteless products, degrade the lives of the producers. Indeed, if any means could be found whereby those who supply the capital—whether private concerns or the public—could be freed from the duty of conducting the industry, could be turned

into a kind of mortgage debenture holders entitled to receive a fixed rate of interest—the results would probably be better for the product, in the artistic aspect, for the methods used for the appliances, for the workers (from manager to labourers), and for the community as a whole. The usual points of friction —remuneration, hours, conditions of labour—would be much more effectively handled by the workers themselves than by those who look merely for profit; for the workers know the facts more intimately. Any regulation from above would be rather regulation as between the public as a whole—the consumers—and the workers, or as between the workers themselves; and the brunt of disputes would fall no longer on the comparatively small and much abused class of profit-makers. But there probably is a long, long way to travel yet before such a suggestion becomes a proposal for action.

Companies and Employees.

There is another matter, which seems unimportant at first sight, but which tends to industrial deadlocks, operating as a hindrance to the settlement of disputes. It is a matter as to which I do not see clearly a remedy under the existing state of company law. Most of the big undertakings are carried on by companies; the employer is a company consisting of shareholders; and most shareholders know nothing of the operations of the business, care for nothing except dividends and the value of their shares. Directors may, or may not, be familiar with the operations as carried on from day to day; but they feel that their duty is to their shareholders, and mostly concentrate their attention on the finances

and the interests of the shareholders only. When a dispute comes before the Court, the directors send a manager or secretary as their advocate, and often he can consent to nothing without their authority. They even fetter him with instructions. Unions do the same with their advocates sometimes. The advocate who hears the discussions, and knows the position, would often, evidently, yield a point or assent to a reasonable arrangement if he were allowed a free hand; but he has to obey his principals. Those who know are cramped in their action by those who do not know. If the directors and the committee of the union could only be present at the discussion, much friction, as well as evidence and argument, could often be saved; but it is too much to expect them to be present. If they could see their way to give their advocate full powers, could make him their plenipotentiary, it would be a great gain. Counsel can bind their client by a consent or a compromise; why should not the industrial advocate have at the least a similar power? Too often a company and its directors bear the aspects to the employees of a deaf and selfish and obstinate body of persons who care nothing except to keep up the receipts and keep down the expenses, and who know nothing of the discussion in the Court. In the recent engineers' case I announced that I would accept whichever course the employers preferred on a certain subject; the employers' advocates met and unanimously selected the course and announced it. I incorporated their choice in the award, and yet an official of a great company concerned wrote (for the directors) a long statement to the newspapers complaining of the course that had been followed, not

knowing that it had been requested by their advocate and the other employers'. The incident points to the lack of contact between the directors' board-room and the Court; but what is lacking most of all is direct contact between the ultimate employer and the employees. Neither the shareholder nor the employees see, usually, the others' point of view.

Unemployment.

There is one industrial sore which no process of arbitration can heal, as it would seem; it is unemployment. It is impossible to overstate the evil effects, moral and physical, on the worker and on the community. The man who goes morning after morning to the gate and is turned away with "Nothing to-day" not only sees his wife and children suffering, but feels personally degraded. It is the man who has no job that drinks in the words of those who favour extreme courses, railing in his bitterness against the society which fails to provide means whereby he may apply his powers and convert his brawn and his brains into bread. The fear of unemployment haunts the workers all their lives; it is the ghost present, like Banquo's, even at a feast. Unemployment of men willing and able to work is also a huge waste of the nation's resources. Newspapers eagerly quote statistics as to losses in production and in wages caused by strikes; but the losses caused by unemployment and curtailed employment are far greater. Last May it was estimated that there were three million workers out of work in the United States, that many more were working only part time, and that the loss in output was fully £6,000,000 per day. Unemployment is a standing

reproach to our modern society; it constitutes a terrible indictment of our whole social organization. It is all a fault of organization, and the remedy must be found. The main cause of unemployment is insufficient demand for the goods; and the main cause of the insufficient demand is the poverty of those who would like to purchase, but cannot. There is no market so good as that of a big population well fed and well paid all round. Over-production of wool or wheat generally means under-consumption of wool or wheat—somewhere. We cannot supply foreigners with money wherewith to buy our products; but can nothing be done with our own people? It has been urged that in slack times the surplus labour force could, under proper organization, be stored up in permanent improvements, such as add to the nation's resources to meet future times of expansion. In times of stagnation, proceed with works of undoubted utility; in times of active demand, release the workers for the production that is necessary. "What you need," it is said, "is a reservoir which will take the supply when the need is less, and give it back when the need is more, thereby keeping a constant circulation at uniform pressure." But organization to any such end must follow a definite and continuous system; the present haphazard practice of Government finding some public work to relieve unemployment when business is slack will not suffice. The whole subject is, as I have intimated, outside the scope of industrial tribunals; but it vitally affects the problems with which the tribunals have to deal. "Give us," said an employee witness recently, "a guarantee of regular employment, and all these difficulties will vanish." He was speaking of restrictions

as to the number of apprentices, and other restrictions incident to trades unionism, restrictions which must hamper and irritate even the best of employers. I find that Mr. Philip Snowden in his recent work, "Labour and the New World," expresses himself strongly to the same effect: "The most potent of the influences which prevent the workers from heartily co-operating in securing the maximum output is the fear of unemployment. If the assurance of permanent employment were given, the whole outlook of labour on the question of production would be changed" (p. 169). As Professor Commons, of the University of Wisconsin, has pointed out in the *International Labour Review* (pp. 66-67), management can provide security of the job if security is deemed important enough; and as the workman's compensation law—practically a tax on accidents—has led to drastic and successful measures for the prevention of accidents; as health insurance, a tax on absences through illness, leads to provisions for securing health; so may we expect that unemployment insurance—a tax on unemployment through discharge of workmen—conduces to proper organization whereby the employees will be secured in regular work and wages.

Special Tribunals.

But whatever may be the necessary shortcomings of the impartial arbitrator, it is clear that any tribunal to be organized must be permanent, or quasi-permanent—not created *ad hoc* for a particular emergency; not opportunist, but acting on defined principles from dispute to dispute. A union that is dissatisfied with the tribunal's award on some subject

must not be provided with another tribunal to deal with that subject afresh—taking what it has got under one arbitrator and insisting on a new arbitration and a new arbitrator for the rest. It is here that, in my opinion, the Government made its mistakes before the Industrial Peace Act, and where the Parliament—I say it with all respect—has made a fatal mistake in that Act. It was this error in particular that induced me to resign the presidency of the Court. I shall not use this book for the purpose of an attack on the Government. The statement which I made on the subject on October 25, 1920, more than a month after the Act was passed, was made with deliberation, and I am content to leave my reasons for others to weigh (see Appendix B). I merely want to give the public the benefit of such experience as I have had, showing the conditions under which not alone the Court, but any substituted tribunal, can carry on its functions usefully.

The characteristic feature of our Courts of Justice, which has earned for them the respect of the public and made them efficient instruments in aid of law and order, is their fearless maintenance of what they deem to be right. They make mistakes sometimes; but they aim at asserting the rule of right as against the force of might—whether the might of powerful barons in former times, or of powerful ministers, or of powerful men of wealth, or of powerful unions in modern times. They decline to act under threat; they will not be "hustled" or "bluffed." In ordinary civil proceedings we should regard it as something monstrous if a disappointed litigant were, by threats of running amuck in the streets, to induce the Government to create a new tribunal and give him a new

trial for his claims or for the balance thereof. What would be unwise as to civil causes is sheer madness in industrial causes, with all their psychological reactions on great masses of workers. There is a saying, "The wheel that squeaks the most gets the most grease"; and if by squeaking or striking, or threatening strike, a union finds that it obtains more of its demands, why, it will "squeak," and other unions will squeak too. It is hard to conceive of a more effective device for encouraging industrial stoppages and for making the work of the Court ineffective. Moreover, the Industrial Peace Act (Sec. 29; in Appendix A) provides that the Court shall not make any award or order inconsistent with the award of the special tribunal; but there is no provision *è converso* that the special tribunal shall not make any award inconsistent with the award of the Court. The proper attitude, I submit, is to say: "You have your remedy by arbitration; you shall have no other remedy by arbitration, and we shall use all the powers that the law gives us if you hold up the community and exploit its needs."

One would have thought that these considerations are obvious. Yet I cannot find in the Hansard reports of the debates on the Industrial Peace Bill, in either House, any allusions on the part of the Prime Minister or of the other members to the psychological effects of the measure on the workers. One member —and one member only, apparently—did suggest that the President or Deputy President should be first consulted; but even that suggestion was not noticed afterwards.

I see that Lord Bryce, in his recent valuable work on Democratic Government (p. 233), says of the

Australian labour leaders that "they know human nature—which is, after all, the thing that a politician needs to know—quite as well, and the particular type of human nature to which most Australian voters belong, very much better" (than their antagonists). He also says that the weak point of Australian politicians (of all parties) is "their deficient education." I have sat as a member in the Victorian House and in the Australian House, and I do not think that any deficiency of education is the weak point, for the purposes of legislation, when the members are compared with members of the British or of the American Houses. What seems to me to be a more serious defect, practically, is the lack of foresight—the lack of the habit of studying the consequences of a measure in its details, the lack of thoroughness in workmanship. The newspapers, however, which are the main source of information available for the public, do not encourage care in workmanship—they give far more prominence to altercations and rude repartees than to solid work.

But if my resignation has the effect of calling the attention of the public to the dangers of the policy recently adopted, it will have a good result. The errors of one Government and of one Parliament may be rectified in the light of experience; and the resolution of the Trades Hall Council, the resolution of the Australian Workers' Union (by far the greatest union in Australia), and the resolution of the federation of all the building trades, and many other similar resolutions, show how eagerly the unionists crave the assistance of the Court and desire that it shall continue its functions. The resolution of the Trades Hall Council was followed up and supported by a

deputation from many unions to the Prime Minister, and by a subsequent deputation to the Acting Prime Minister, but with no result. I fancy, however, that some of the ministers and members now see that a mistake has been made, see that they have taken the wrong road; for there is more reluctance now, apparently, to create special tribunals than before my announcement.

Experiment.

But if we overlook the mistakes—temporary, as we must hope—of special tribunals, and the mistake made by the Constitution in committing industrial matters both to the States and to the Commonwealth, there is much encouragement to be derived from the contemplation of the Australian experiments of industrial tribunals. Australia has in several matters anticipated other countries in its legislation—perhaps because of freedom from external complications. All the States adopted the Torrens system for simplification of titles to land, in spite of the opposition of the lawyers, and with great success. All the States anticipated Britain and other countries in providing for vote by ballot, disregarding the dogmatic censures of Sidney Smith and many others. Australia was, I believe, one of the first countries to adopt female suffrage. But the provisions of Courts for the protection of human life employed in industries is probably the most characteristic contribution of Australia (and New Zealand) to general civilization. Naturally, as the legislation affects so many powerful interests, there has been grumbling; but the antagonism is still more bitter of those theorists who preach the necessity for cataclysmic revolution. There are

many proposals to improve the system; but there is not any proposal to abolish it. The minimum wage laws now in force, and projected, in Britain and in many of the States of America, as well as the legislation of Norway and Kansas, and the projects of laws as to public utilities in France and elsewhere, show that the example of Australia has had already considerable effect abroad. It may fairly be said, I think, that the greatest gains which humanity has made for itself have been the result of bold experimentation, with correction of mistakes. The men who saw a goal before them and made for it, despising difficulties, surmounting obstructions, ignoring abstract and untested doctrines, have done marvels. Some seven hundred years ago the great Oxford friar, Roger Bacon, preached: "Experiment, experiment—pore not over the teaching of Aristotle to find solutions." "Machines for navigating," said he, "are possible without rowers, so that great ships suited for river or ocean, guided by one man, may be borne with greater speed than if they were full of men. Likewise cars may be made so that without a draught animal they may be moved *cum impetu insestimabili*, as we deem the scythed chariots to have been from which antiquity fought. And flying machines are possible, so that a man may sit in the middle turning some device by which artificial wings may beat the air in the manner of a flying bird." In these days the problems of industry must be approached, not through the dicta of the political economists of the nineteenth century, but by thoughtful and well-directed experiment. There are many analogies. The learned pundits taught in the time of Galileo that a body ten times as heavy as another falls ten times as fast.

Galileo climbed the Leaning Tower of Pisa and put the doctrine to a test. The doctrine turned out to be wrong. King Charles II. propounded to his new Royal Society the question, "Why does a dead fish weigh heavier than a live one?" The members gravely addressed themselves to explanations; but someone said, "I doubt the fact." Fish, alive and dead, were weighed, and the live weighed as heavy as the dead. The good Earl of Shaftesbury was warned by Senior and other economists that the industries of England would be ruined unless children worked in factories for ten or twelve hours per day. After many fruitless efforts he induced Parliament to put the matter to test; and the industries became more prosperous than ever. Learned men said that navigation by steam was impossible, that air-flying was beyond human powers; and they were wrong. They told us that a law for minimum wages was absurd, that the wage fund was fixed by irreversible economic laws, that the laws so-called of demand and supply were inexorable, that industrial tribunals were impracticable; and they were wrong. We all make mistakes, and we have to learn by our mistakes. The man who makes no mistakes, it is said, generally makes nothing. Industrial tribunals are doing their best for human life, the only wealth. It is the noblest objective. We work and learn.

APPENDIX A.

Industrial Peace Act, 1920; *assented to September* 13, 1920.

PART IV.—SPECIAL TRIBUNALS.

13. The Governor-General may appoint a special tribunal or tribunals for the prevention of, or settlement of, any industrial dispute or disputes.

14. (1) A special tribunal shall consist of an equal number of representatives of employers and employees respectively, together with a chairman.

(2) The chairman shall be chosen by agreement between the representatives of employers and employees, or, in default of agreement, shall be appointed by the Governor-General.

15. (1) A special tribunal shall have cognizance—

(*a*) Of any industrial dispute between an organization of employees on the one hand and employers or associations of employers on the other hand referred to it by the persons or organizations parties thereto; and

(*b*) Of any industrial dispute, as to which a conference has been held under Section 18 of this Act and as to which agreement has not been reached as to the whole of the dispute, and which has been referred to the special tribunal in accordance with Section 20 of this Act;

and have power to inquire into all matters relevant to the dispute from the point of production to the final disposal of the commodity by the employer (in the case of a producing industry), and the decision of the tribunal on the question of relevancy shall be final:

Provided that no dispute as to which the hearing has commenced in the Court shall be referred to a special tribunal.

(2) No evidence relating to any trade secret, or to the profits or financial position, of any witness or party shall be disclosed except to the tribunal or published without the consent of the person entitled to the trade secret or non-disclosure.

Penalty: Five hundred pounds or imprisonment for three months.

(3) All such evidence shall, if the witness or party so requests, be taken in private.

16. A special tribunal shall have power to hear and determine any industrial dispute of which it has cognizance, and for the purpose shall have (in addition to any other powers conferred on it under this Act) all powers which by the Commonwealth Conciliation and Arbitration Act, 1904-1918, are expressed to be given to the Court or the President as regards an industrial dispute of which the Court has cognizance; and any act or omission on the part of any person which would, if the hearing or inquiry were the hearing of an industrial dispute before the Court, be an offence against the Commonwealth Conciliation and Arbitration Act, 1904-1919, shall be an offence against this Act.

17. Any order or award made by a special tribunal shall be binding on the parties, and may be enforced as an award of the Court.

18. (1) A special tribunal or the chairman thereof, or the Minister, or any person thereto authorized in writing by the Minister, may for the purpose of preventing or settling industrial disputes summon any person to attend, at a time and place specified in the summons, at a conference.

(2) "Any person" (last occurring) in the last preceding subsection includes not only persons engaged in or connected with an industrial dispute, but also any

person engaged in or connected with any dispute relating to industrial matters (whether extending beyond the limits of a State or not), and relating in any way to an industrial dispute, and also includes any person, whether connected with an industrial dispute or not, whose presence at the conference the person or tribunal summoning the conference thinks is likely to conduce to the prevention or settlement of an industrial dispute.

(3) Any person so summoned shall attend the conference and continue his attendance as directed by the person or tribunal summoning the conference.

(4) The conference may be held partly or wholly in public or in private at the discretion of the person or tribunal summoning the conference.

19. Where, at the hearing before a special tribunal, or at any conference summoned in pursuance of this Act, an agreement as to the whole or part of any industrial dispute is made in writing between parties thereto, the agreement may be filed with the Industrial Registrar, and shall thereupon have effect in all respects and be binding on the parties and enforceable as if it were an award of the Court.

20. Where a conference has been held under Section 18 of the Act, but agreement has not been reached as to the whole of the industrial dispute—

(*a*) The chairman of the special tribunal, if the conference was summoned by the special tribunal or the chairman thereof, may refer the dispute to the special tribunal; or

(*b*) The Minister, if the conference was summoned by him or by a person authorized by him, may refer the dispute to a special tribunal.

21. During the currency of any award or order made by a special tribunal or a local board under this Act, the Court shall not have jurisdiction to make any award or order inconsistent with any such award or order.

APPENDIX B.

STATEMENT MADE IN COURT BY MR. JUSTICE HIGGINS ON ANNOUNCING HIS RESIGNATION (SEPTEMBER 25, 1920).

Two of the three Bills affecting this Court have now become Acts of Parliament. Parliament has expressed its will, and there is no hope of reconsideration. As in duty bound, there being no request for my opinion, I have refrained from comment on the Bills during the deliberations; but now I am free. I see no course open to me but to resign my office as President of the Court as soon as I have completed certain matters partly heard, and it is due to the public that I should state my reasons. Under ordinary circumstances, it would be sufficient to state my reasons to the Attorney-General; but the present Attorney-General, as Prime Minister, is the author of the Bills.

It is now generally recognized that the Court has been of great public service, keeping the wheels of industry moving, standardizing working conditions, and easing the conditions of the workers under the pressure of the rising cost of living, and that it has, within the limits of its jurisdiction, saved the community from the violent crises which have occurred during and since the war in Great Britain, Canada, the United States, Italy and elsewhere; few people know, however, what grave perils the Court has averted. By the Industrial Peace Act the Prime Minister (unwittingly, I think) undermines the influence and usefulness of the Court, and creates a position which will surely give rise to many industrial stoppages.

Part IV. of the Act enables the Government to

appoint a special tribunal for the prevention or settlement of any industrial dispute. This is to be a temporary tribunal for a particular dispute, and it is to be the creature of the Executive Government. From the nature of the case, any such temporary tribunal must be merely opportunist, seeking to get the work of the particular industry carried on at all costs, even the cost of concessions to unjust demands, and of encouraging similar demands from other quarters. On the other hand, a permanent Court of a judicial character tends to reduce conditions to system, to standardize them, to prevent irritating contrast. It knows that a reckless concession made in one case will multiply future troubles. A union that knows that a certain claim is unlikely to be conceded by the Court will bring pressure to bear upon the Government for a special tribunal; and the special tribunal appointed by the Government will be apt to yield to demands for the sake of continuity in the one industry before it, regardless of the consequences in other industries. The objectives of the permanent Court and of the temporary tribunal are, in truth, quite different—one seeks to provide a just and balanced system which shall tend to continuity of work in industries generally, whereas the other seeks to prevent or to end a present strike in one industry. The chairman of the recent coal tribunal spoke sound sense when he said: "It is clearly an impossible situation if you should come before this tribunal to see what you could get, and if you are not satisfied then go before some other tribunal of a concurrent jurisdiction." I might go even further, and say that a permanent Court, working on a reasoned system and for many industries, cannot function in competition with temporary tribunals created to avoid or end a specific strike in a specific industry. A tribunal of reason cannot do its work side by side with executive tribunals of panic.

Moreover, the awards of the Court are no longer to have that finality which was provided in the Act under which the Court was constituted (Section 31). I take a concrete illustration of a position which is quite probable. A union seeks an award as to wages, hours, and many other conditions. One claim is for a thirty hours' week—five days of six hours each. The Court grants other claims, but refuses the claim as to hours. The union accepts what is granted, but does not drop its movement for the reduction of hours. It sends to the employers a demand for a thirty hours' week, or (to avoid a possible legal difficulty) a demand for a thirty-three hours' week. The employers refuse, and the union threatens strike. A Minister summons a compulsory conference under the new Act. There is no agreement. Then the Government appoints a special tribunal to settle the dispute as to the thirty-three hours, and that dispute alone. The Government appoints the chairman. The chairman owes his temporary position to the Government, and has no responsibility as to other industries. The Minister refers the dispute to this tribunal, and the tribunal reconsiders the question of hours, which the Court has already considered, and on which it has made an award as part of a whole consistent and interdependent scheme. The tribunal knows that it acts under a threat of strike if the hours are not granted, and it is naturally anxious that operations should not cease. If the claim be granted, the union—and other unions—will attribute the victory to the weapon of strike, and strikes and threats of strikes are thus encouraged. If the claims be not granted, the position will be just as bad as, if not worse than, when the Court gave its award.

This is no fancy picture. I have on other occasions been reluctantly compelled to animadvert on the action of the Prime Minister in creating tribunals supple-

mentary to this Court under the pressure of strike or threat of strike—in the cases of the waterside workers, the marine engineers, etc. It was pointed out that the Prime Minister had no power to appoint such tribunals, but now Parliament has given him the power, by an Act passed at his instance. The tribunals will, no doubt, be often a convenient mode of yielding to strike without expressly admitting it; the disastrous experiments of the seamen's case, the marine engineers' case—where the Executive, without consulting the Court, substituted its own wage scales for those of the Court—will be repeated. I decline to be responsible for the Court under the new conditions.

My objection is not to the creation of other tribunals in addition to this Court. To create some permanent tribunals, for specific industries or groups of industries, might be a legitimate way of relieving the Court of the pressure of business. But they should be permanent, not temporary, and there ought to be some co-ordinating authority, like an Appeal Court, to bring the several tribunals into consistency and system; for the tribunals, being independent of each other, must sometimes differ in their awards, and there is nothing that creates more industrial troubles than contrasts in conditions unless it be an intermeddling and pliable Executive.

It was my honoured friend the late Alfred Deakin who, as Prime Minister, asked me to undertake the work of this Court. The work was committed to me in 1907 for seven years. My second term will expire in September, 1921, and nothing but the strongest reasons would induce me to abandon the trust before the appointed time. It is true that the work is very exacting, and that a release from the duties will bring me much more leisure than I have known for many years, with relief from intense strain and from partisan abuse. It is true that the Prime Minister has not consulted either

Mr. Justice Powers or myself as to the details of any of the Bills, or asked for suggestions, although an experience of seven years in the one case and of fifteen years in the other would have been gladly made available for the benefit of the country. It is true that the Government has neglected for years to relieve the congestion of business in the Court by taking steps for the appointment of a sufficient number of Deputy-Presidents. It is true that in August, 1917, I sent in, at the request of the Prime Minister, suggestions for the improvement of the Act, and that nothing has been done as to any of the suggestions until now, and that several other urgent suggestions based on my actual experience have been ignored or mishandled. It is true that since I refused to carry out his will in the case of the waterside workers, in September, 1917, the Prime Minister has not given me any idea of his intentions as to the Court, and that he even intimated (September 28, 1917) that he might give Parliament an opportunity to consider the advisability of removing me from the Court. Yet I do not think that even such treatment would justify my resignation; my resignation is due to my opinion that the public usefulness of the Court has been fatally injured.

I make this announcement at once, at my first sitting in this Court since Parliament committed itself to this policy. I make it now with the view of giving the authorities time to make any new arrangement.

INDEX

PRINTED IN GREAT BRITAIN BY
BILLING AND SONS, LTD., GUILDFORD AND ESHER